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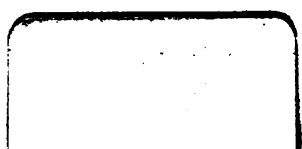
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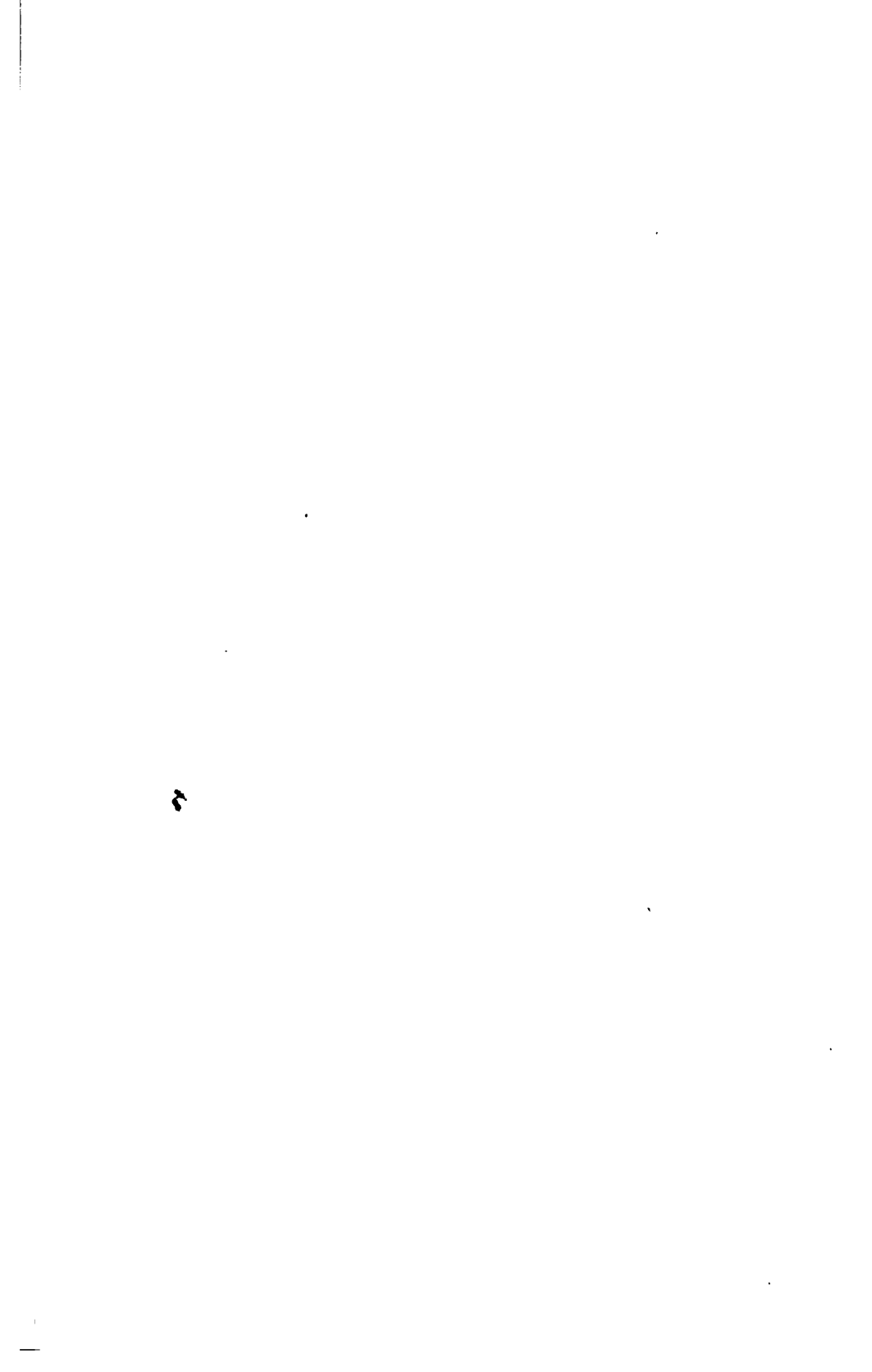
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**LAWRANCE'S
BENGAL LAW REPORTS**

BEING

**DECISIONS OF THE HIGH COURT AT
CALCUTTA,**

AND

OF HER MAJESTY'S MOST HONORABLE

PRIVY COUNCIL

OF

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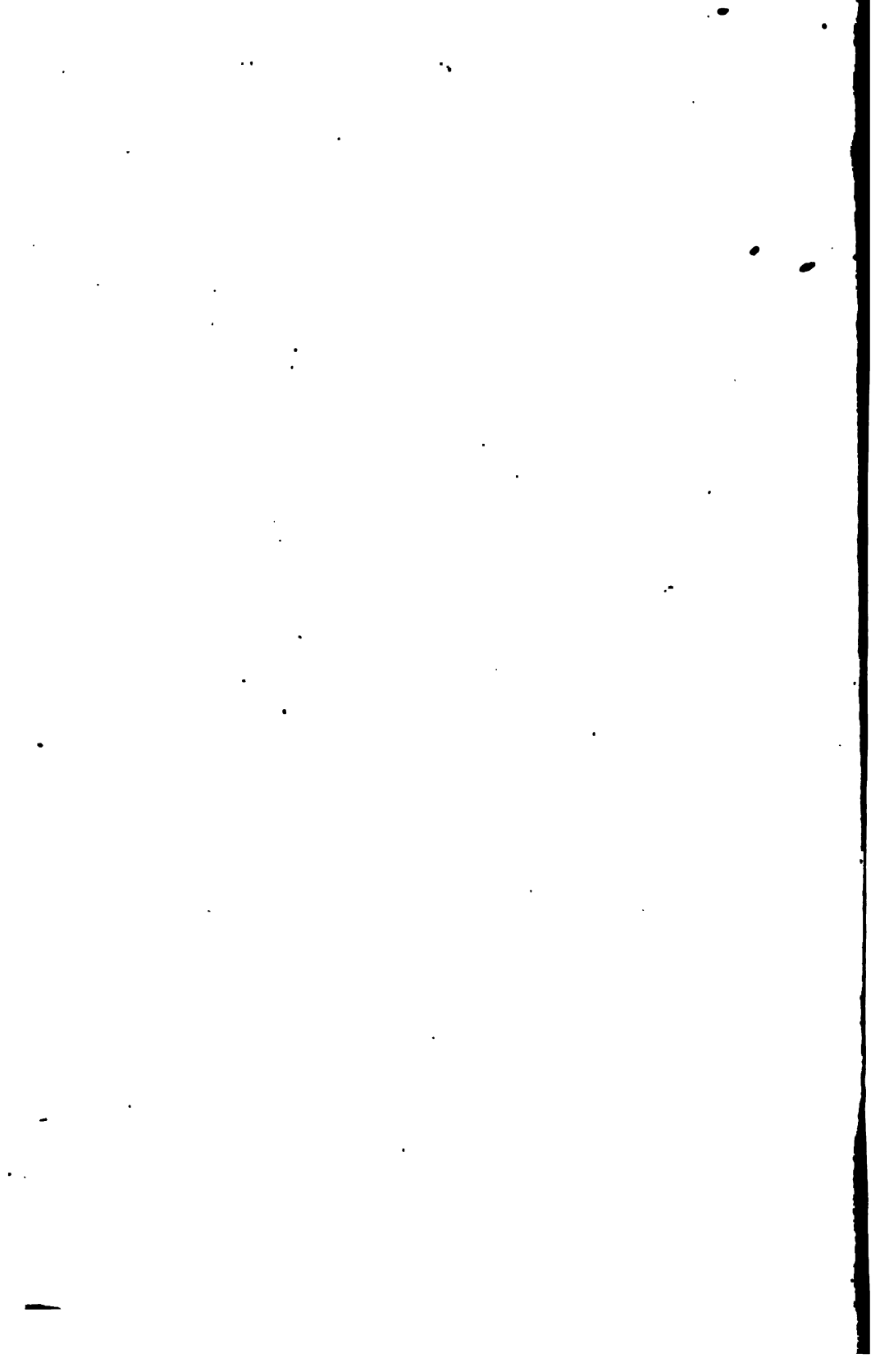
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LAWRANCE'S. BENGAL LAW REPORTS.

PRIVY COUNCIL.*

MUSSAMAT FANNY BARLOW (PLAINTIFF) v.
SOPHIA EVELINE ORDE AND OTHERS
(DEFENDANTS).

1870
March 9.

ON APPEAL FROM THE COURT OF THE JUDICIAL COM-
MISSIONER OF THE PUNJAB.

*Will—Domicile—Rules for Interpretation—"Children"—Accretions to
Property from Rents.*

The construction of a will must depend on the law of the testators domicile ; but if no particular law is applicable, the will is to be interpreted according to principles of natural Equity. See also
12 B.L.R. 77;

In applying any rules to the wills of Hindus, Mahomedans, or East Indian Christians, respectively, their particular habits and modes of life must be looked to guide the interpretation.

From the context of the will and surrounding circumstances, "children" may be interpreted as illegitimate children.

Where by will the income of estates was left to devisees for life, with a gift over of the corpus on their death, and a portion of the income instead of being divided among the tenants-for-life was applied to the purchase of other estates, held, these estates did not pass to the remaindermen, but formed the absolute property of the tenants-for-life, and passed to their devisees.

THIS was an appeal from a decision of the Judicial Commissioner of the Punjab, whereby a suit, brought by the appellant, claiming under a will of Major James Skinner, to establish a right to share in his property devised to her and her illegitimate son, was dismissed.

The Court of first instance decreed in favor of the appellant ; the Civil Judge reversed that decree ; and the Judicial Commissioner affirmed that reversal.

* *Present* :—THE RIGHT HON. THE LORD WESTBURY, SIR J. W. COLVILLE,
SIR JOSEPH NAPIER, AND SIR LAWRENCE PEARL.

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MUSSAMAT
F. BARLOW
P.
SOPHIA
EVELINE
ORDE.

The facts were as follows :—

Colonel Skinner, C. B., who at the time of his decease commanded a Corps of Irregular Horse, in the service of the late East India Company, was eminent in his profession, and in consideration of his services the Governor-General, in 1819, by an order in Council, granted, in Altunga, certain villages in the district of Meerut to him "and his heirs after him, or to such persons as he may devise by his last will and testament, or by any other valid instrument, with their heirs in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share, shall conform himself to the dispositions of his said will."

Colonel Skinner had also before his decease acquired considerable landed and house property by purchase, and had taken on lease many villages, in many instances the Government being the lessors. He died in December 1841, leaving a will executed on the 10th May 1841, the material part of which is as follows :—

"2nd.—I will and direct that all my just debts and funeral charges be paid and discharged by my executors hereinafter named.

"3rd.—I will and bequeath the rest of my property, of whatever nature, I may die possessed of, or that may be coming to me by gift, will, or as heir-at-law, or in any other manner, to my sons Joseph, James, Hercules, Alexander, and Thomas Skinner, or the surviving heirs of them, in equal shares or dividends."

And after bequeathing certain annuities, the testator directed that "the whole of the above sums revert to my sons after the death of the legatees. The whole of the above sums to be paid from my Altunga and zemindari half-yearly, or Fuslee dur Fuslee."

And after making certain donations, the said will provided as follows :—

"I leave and bequeath the income of my Altunga, zemindari, and tika villages, gardens, and houses to my five sons, herein named, Joseph, James, Hercules, Alexander, and Thomas Skinner, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed

property of the Altumga or zemindari. One of my sons, whichever is most fit, or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get ten per cent. from the whole income, and he is bound to show a faithful account current yearly to his brothers.

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"Should they like to live together, they may live at Belas; poor, and build houses with mutual consent in the Altumga or zemindari.

"Should my personal property not pay off all my debts, they may sell my house at Delhi and my garden at Trevellian-gunge; but should the personal property pay the debt, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five sons.

"In the event of the death of any of my boys previously to attaining the age of twenty-one years without issue; his or their portion or portions of the Altumga, zemindari, and tika villages shall revert to the surviving brothers for the benefit of the survivors and their heirs, and his or their portion or portions of other property willed by me shall be equally divided amongst all my surviving male children.

"I will and declare that it is my intention and meaning that, in the event of all or any of my aforementioned sons Joseph, James, Hercules, Alexander, and Thomas Skinner dying and leaving issue or children, that the share of the fathers shall devolve on the issue or children to be by them divided in equal shares.

"I will and declare that, in the event of the death of all my reputed children, Joseph, James, Hercules, Alexander, and Thomas Skinner, and without issue, that my Altumga rights, zemindari, tika villages, and all and every of the sums bequeathed to them shall devolve to my daughters, Louisa and Elizabeth, and to my grand-daughter Sophy, or their lawful issues, to my late brother Major Robert Skinner's children and their issues, in equal shares and dividends.

"I will and direct that the expenses attending the education of my two minor sons, Alexander and Thomas Skinner, as well as the expenses necessary for their support and other contingencies during their minority, or until they shall attain

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v. .

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or arrive at the age of majority, or twenty-one years, shall be defrayed from their shares of the Altumga, zemindari, and tika villages, the balance remaining to be paid to them when they become twenty-one years of age,—the manager to put the balance of their shares in each of their names in Company's Papers."

And after directing that "if the manager finds amongst his brothers any capable of assisting him in the management of the estate, trades, or affairs, he may appoint assistants and pay accordingly."

And after giving instructions as to the management of the property of his deceased brother Robert Skinner, by whom he had apparently been appointed executor, the testator by his will did "nominate, constitute, and appoint Joseph Skinner, Esquire, Lieut. James Skinner, and Lieut. Hercules Skinner, his sons as executors and joint managers to all his zemindari, tika villages and Altumga rights, &c., &c., of that his last will."

Upon the testator's death, his son, James Skinner, took the management of the testator's property, and during his management certain properties were purchased by James Skinner as such manager, out of surplus rents, such purchases being uniformly treated as parts of Colonel Skinner's estate.

Joseph Skinner, the eldest son of the testator, died some time in the year 1855 intestate, leaving an illegitimate son, George, to whom a certificate to his putative father's estate was granted under Act XX of 1841, and he received the income of Joseph Skinner's share of Colonel Skinner's estate although he was not a legitimate son of Joseph Skinner.

James Skinner, the second son of Colonel Skinner, was legally married to a Miss Sophia Barlow, by whom he had one lawful child, the respondent, Sophia Eveline Orde, referred to in Colonel Skinner's will as his "grand-daughter Sophy."

During Colonel Skinner's lifetime, James Skinner appears to have formed an illicit connexion with Charlotte Barlow, his wife's sister, and to have had illegitimate issue by her, one son, Stewart. Charlotte Barlow and her son Stewart were turned by Colonel Skinner out of his house, and he expressed very

strong indignation at the connexion so formed by James Skinner. After Colonel Skinner's death, James Skinner cohabited with the appellant, Fanny Barlow, another sister of his lawful wife, and the result of such illicit intercourse was a son, James Skinner the younger, also an appellant.

• James Skinner, the son of Colonel Skinner, died, having first executed a will, dated the 10th of November 1859, of which the following is a copy :—

"This is the last will and testament of me, James Skinner, a Major on the retired list of Her Majesty's Bengal Indian Army, and second son of the late Colonel James Skinner, C.B., Commandant of the 1st irregular Cavalry. Firstly, I give, devise, and bequeath my share of the landed interests, devised to me by the last will and testament of my late father, Colonel James Skinner, dated Hansee, 10th May 1841, consisting of Altumga, zemindari, tika villages, indigo factories, houses, and other lands specified therein; also all and every sum and sums of money which may be due to me at the time of my decease; and also all other debts, or money, or bonds, or other securities to be equally divided between my daughter, Mrs. Sophia Eveline Orde, and my son James, and to their descendants in perpetuity, and a salary of one hundred (100) rupees per month to their respective mothers, Mrs. Sophia Elizabeth Skinner and Fanny Barlow, *alias* Villactee Begum, which, on their demise, is to revert respectively to their children above named, *viz.*, Mrs. Skinner's to my daughter Mrs. Orde, and Fanny Barlow's *alias* Villactee Begum's, to my son James; and likewise, in case of the decease of the children without issue or descendants, their shares are to revert respectively to their mothers as above mentioned. And I request my executors will adopt measures to carry these my last wishes into effect, as also to pay for my son James's schooling and maintenance as long as he is a minor, and to invest the surplus of his share in the best Government loan that may then be open, and to be made over to him on his obtaining the age of maturity or twenty-one years.

"As my son James is not educated or otherwise provided for, I leave and bequeath to him, and to his mother Fanny Barlow

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alias Villactee Begum, the whole of the villages, landed property, &c., &c., &c., which have been purchased for the estate since the late Colonel Skinner's demise, and in which I have a fifth share; also my house, out-offices, and other lands at Hansee; and on their demise the share of the one to devolve on the other if my son James may die without issue or descendants. Should I happen to die in debt, I ardently hope and beseech my executors to effect such arrangement and compromise with my creditors as will not prevent the above legacies from being carried into effect, otherwise to make a proportionate deduction from the share or income of each legatee.

"The Isphihanne sword, with the golden scabbard, given to me by my late father, Colonel James Skinner, in 1839, I leave and bequeath to my son James; and on my demise should any of my personal property, such as my rifles, guns, pistols, watch, uniform, plate, &c., &c., &c., which may be then in my possession, and which my son James fancies and wishes to retain in memory of me, may be made over to him, and the remainder to be sold for the payment of my funeral and testamentary expenses.

"I hereby constitute my brothers, Captain Hercules Skinner, now an unattached Captain on Her Majesty's Bengal Establishment, Thomas Skinner, Esquire, Colonel C. G. Barlow, Major Milne, commanding 21st Regiment Bengal Native Infantry, Messieurs Luckhmee Chund, Radha Kishon, and Gobind Doss, Seiths of Muttra, and our faithful and trustworthy agent Lalla Khealee Ram, to be my joint executors, and hereby revoking and making voidable former or other wills by me at any time heretofore made, I declare this to be my last will and testament, executed by me in bodily good health and in sound and disposing memory."

Major James Skinner appears to have been indebted at the time of his decease to the amount of 70,000 rupees and upwards.

On the 8th October 1861, his wife and daughter made an application under Act XXVII of 1860, for a certificate of succession to Major James Skinner, and such application was

opposed by the appellant, Fanny Barlow, on her own behalf, and on behalf of her illegitimate son James Skinner, and also by Major James Skinner's other illegitimate son, Stewart Skinner. On the 20th of December 1861, the Judge of the Civil Court of Meerut directed that the certificate should be granted to the respondent as the lawful daughter.

On the 22nd of July 1862, the last-mentioned decision was confirmed by a judgment of the Sudder Dewanny Adawlut, North-Western Provinces.

The appellant thereupon brought the present suit to have her own and her illegitimate son's rights declared.

The final decision being wholly against her, she now appealed to the Privy Council.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, Q. C., for the appellants.

Mr. *Pontifex*, Mr. *Pritchard*, and Mr. *Nasmith* for Mrs. Orde.

Mr. *Bell* for Alexander Skinner.

For the appellants it was contended that there were no reasons for applying the strict rules of English law to the peculiar position of the family. *Abraham v. Abraham* (1) was cited. and on the subject of the arrears and accumulation *S. M. Soorjeemoney Dossee v. Denobundoo Mullick* (2) was referred to.

The respondent, Alexander Skinner, supported the contention that illegitimacy was to be recognized.

On behalf of Mrs. Orde the English law was relied on for the interpretation of the words, and *Cooper v. Cooper* (3) and *Hawkins on Wills*, page 80, were referred to.

Their Lordships took time to consider their judgment, and on the 8th March their judgment, was delivered by

LORD WESTBURY.—The question in this appeal depends on the construction and legal effect of the will of Colonel James Skinner, who was an officer in the service of the East India Company.

(1) 9 Moore's I. A., 195. (2) 6 Moore's I. A., 526. (3) 1 K. & J., 658.

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Colonel Skinner died in the month of December 1841, and at the time of his death, he was resident and domiciled in the Delhi territory, which then formed part of the North-Western Provinces of India, but which, after the mutiny, was placed under the administration of the Punjab Government.

The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which, again, mainly depended on his religion.

Thus the succession of a Hindu would, as a general rule, fall to be regulated by Hindu law, and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged.

If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice in the province were to act according to justice, equity, and good conscience.

Such is the substance of the Regulations as explained in the case of *Abraham v. Abraham* (1) which were made by the East India Company for defining the jurisdiction of the Courts of the Province in which Colonel Skinner was domiciled, and which were in force at the time of his decease.

There is little evidence from which the personal *status* of Colonel Skinner may be ascertained, beyond that which is afforded by the will.

It is stated, and there is proof, that he was illegitimate, being probably the child of a native woman by a European father. As a commander of a Corps of Irregular Light Horse, he acquired great distinction in the military service of the East India Company, and, in consideration of his services, he obtained grants of large landed estates, situate partly in the North-Western Provinces and partly in the territory of Delhi.

(1) 9 Moore's I. A., 195.

The form of a renewed grant of some of these estates made to Colonel Skinner by the Marquis of Hastings when Governor-General, may be material to be noticed. The grant was made to the Colonel in "Altumga," to take effect from the beginning of the year 1226, Fuslee era (1819), and contained this special form of limitation, viz. :—"To Colonel Skinner and his heirs after him, or to such persons as he may devise by his last will and testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share, shall conform himself to the dispositions of the said will." Had the grant been simply to the Colonel and his heirs in "Altumga," the grant would have come to an end on the death of the Colonel without leaving lawful issue, and the superadded special power of testamentary disposition, therefore, is regarded as an indication that the grantee was conscious that he was not likely to leave lawful issue, and, therefore, obtained the grant of a power of disposition. This argument, however, is not of much weight. Colonel Skinner does not appear to have been ever married, but he seems to have kept several native women as part of his family, with whom he cohabited, and by whom he had several children.

There is nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages.

His origin is unknown : being illegitimate, he belonged to no family, and all that can be collected is, that he was probably a soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the Service of the East India Company.

It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the Colonel's will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice.

In English law there is a technical rule of construction, that under a testamentary gift to children as a class, illegitimate children, although recognized by a testator in his life-time, can-

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not be permitted to share jointly with natural, lawful children ; and the respondents contend that this rule is applicable to the construction of the will of Colonel Skinner ; but, for the reasons we have already given, we are of opinion that Colonel Skinner's succession is not to be administered according to English law, and that there is no room therefore, for the application of this English rule of construction. The word "children" where it occurs in Colonel Skinner's will, must be taken in that sense, and receive that signification in which it is plain from the language of the will, and the dispositions it contains, that it was used by the testator,—that is to say, its extent of meaning in the vocabulary and mind of the testator must be determined from the will itself.

The testator had at the times of making his will and of his death, five sons and two daughters, all of whom were illegitimate, for it seems to be certain that no rite or ceremony of marriage had ever taken place between the Colonel and any one of the mothers of these children.

All of these sons and daughters, however, appear to have been acknowledged by the testator during his life as his children, and they are expressly called by him in his will his "sons and daughters."

Thus the will begins with a general gift "to my sons Joseph, James, Hercules, Alexander, and Thomas," and after giving various pensions to servants and others for life, the testator directs that they shall revert "to my sons."

The sons are again in a subsequent part of the will referred to under the term "male children," and afterwards they are called "my reputed children."

It appears that the testator had a brother, Major Robert Skinner, who like himself had never been married, but at the date of the Colonel's will was dead, leaving several illegitimate children, who had been treated and acknowledged by their father during his life-time as his children.

It appears also from the will of the Colonel, that he had been appointed trustee or guardian of these children, and must be taken to have been well acquainted with their real *status* or condition of illegitimacy. It is important, therefore, that we find

in the will a devise in certain events " to my late brother, Major Robert Skinner's children and their issues in equal shares."

Here the illegitimate offspring of Major Robert are called his children, and are associated as tenants in common with the testator's daughters and granddaughter and their lawful issues.

• The correctness of the interpretation which we put on the word " children " in this will, as denoting the offspring of sons, is much confirmed by the fact that there is a marked change of expression in the will when the Colonel speaks of the issue of his daughters.

It is natural to suppose that he would shrink from the thought of his daughters forming any other connections than those of lawful marriage, or of their having any but lawful issue. Accordingly when he provides for the event of the death of all his reputed children (meaning his five sons) without issue or children, and directs that the property given to them shall devolve to his daughters Louisa and Elizabeth, and his granddaughter Sophy (who was born in wedlock), or their *lawful issues*, we find a remarkable change of expression which is not to be found in any of the gifts to the children or issue of his sons.

It appears also from the evidence that the Colonel's eldest son Joseph (who died in the year 1855) had no lawful issue, but had one illegitimate son, named George, who was born some years before the death of the Colonel, and was always recognized and treated by the testator as his grandson ; and it is also proved that on the death of his father, Joseph, George—this reputed son—was permitted to succeed his father, and has, in fact, taken the share devised to Joseph, by the will.

The limited signification which in our law is put upon the word " children," when used as the designation of a class, and not as *descriptio personarum*, is probably the result of the Christian law of marriage.

According to natural law, the children of a man mean the issue begotten by him, and the *criteria* of this condition are, the being born of a wedded wife or wives, or, if born of other women, the being recognized and acknowledged as children by the father.

With regard to his sons, the Colonel probably felt the same

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indifference as to their being married or not, which he had shown in his own case.

The conclusion, therefore, at which their Lordships have arrived is, that the word "children" in the will of Colonel Skinner denotes and includes as well illegitimate as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative father.

We proceed to apply this conclusion to the case which is before us, and which arises on the following clause in the testator's will:—"I will and declare that it is my intention and meaning that, in the event of all or any of my aforementioned sons, Joseph, James, Hercules, Alexander, and Thomas Skinner dying, and leaving issue or children, that the share of the fathers shall devolve on the issue or children, to be by them divided in equal shares." As has been already stated, the first son Joseph died intestate in the year 1855, without lawful issue, but leaving an illegitimate son, George, who, with the assent of the majority of his uncles, succeeded to his father's share under the devise.

James, the second son, died in the year 1861, leaving one legitimate daughter, Sophia Orde, and an illegitimate son, James Skinner; and the question is whether the share of James the father in the property devised to his five sons by the will of Colonel Skinner vests, as to the share of James, in his daughter Sophia exclusively, or in the said daughter and the son James as tenants in common. For the reasons we have already given, we are of opinion that the share of the son James belongs to Sophia Orde and James the son equally as tenants in common. James is named and described as his son in the will of his father James, and, therefore, there is a natural equality of *status* between him and his sister, Mrs. Orde, and both take equally under the aforesaid gift made by the will of their natural grandfather.

The next and subordinate question in this appeal relates to the will and succession of James, the second son of the testator.

By his will, dated 10th November 1859, after devising all his share of the landed interests devised to him by the will of

his late father, and which he particularly mentions, and after also bequeathing all sums of money due to himself at the time of his decease, and also all other debts, money bonds, or other securities, unto his daughter, Mrs. Sophia Evelina Orde, and his son James, to be equally divided, the will contains the following passage :—" As my son James is not educated or " otherwise provided for, I leave and bequeath to him and to his " mother, Fanny Barlow, *alias* Villactee Begum, the whole of " the villages, landed property, &c., &c., &c., which have been " purchased for the estate since the late Colonel Skinner's " demise, and in which I have a fifth share, as also my house, " out-offices, and other lands at Hansee."

The question between the appellants and respondents is, what property passed under this last devise ?

The facts, although they are not very clearly stated, appear to be, that whilst the estates devised by the Colonel to his sons were under the management of the executors or managers appointed by the Colonel's will, considerable sums, being surplus rents of the devised estates, but not drawn by the devisees, the sons, were laid out in the purchase of additional landed property ; and it is contended by the respondents that these new acquisitions must be regarded in law as accretions to the original devised estates, and as passing with them under the gifts made by the will.

If this were so, the share of James, the son, in the purchased estates would be divisible, like his share in the original estates, between his daughter, Mrs. Orde, and his son, James, under the Colonel's will, and would not pass under the devise contained in his own will.

But their Lordships find no ground for this conclusion, and they are of opinion that the purchased estates follow the ownership of the purchase-money, which was the absolute property of the five sons in equal shares ; and they are of opinion, therefore, that the testator James's fifth share in these purchased estates passed under the aforesaid devise in his will.

But another question was raised at the bar by the respondent's counsel, who stated that some leases granted to Colonel Skinner by the Government of certain villages and lands expired

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at the death of the Colonel, and that renewals were made by the Government to the Colonel's devisees, which renewed leases were, it was contended, obtained by virtue of the original ownership of the devised estates, and must, therefore, in equity, be subject to the gifts made by the will of the devised estates.

It was incumbent on the respondents to have stated and proved the facts on which this claim is founded, so as to have enabled their Lordships to decide the question; but this has not been done, and it does not appear to have been considered and determined by the Courts below.

If, however, Mrs. Sophia Orde requests, and is content to take at her own risk, an inquiry on this subject, their Lordships will recommend that such inquiry shall form part of the order to be made. Their Lordships will humbly recommend Her Majesty to reverse the decree appealed from, and to declare that Mrs. Sophia Orde and James, the son and daughter of Major James Skinner, are entitled in equal shares by virtue of the will of Colonel Skinner, to one equal fifth part of all the estates and property thereby devised and bequeathed to the testator's five sons in equal shares; and also to declare that one equal fifth part of all the estates and property purchased or acquired after the death of the Colonel by means of the rents, profits, or income arising from the estates and property devised and bequeathed to the said five sons of the testator, absolutely to his second son, James Skinner, and passed, under the will of the last-named James, to Mrs. Fanny Barlow and his son, James, absolutely in equal shares; and, at the request and risk of Mrs. Sophia Orde, let an inquiry be made, by or under the direction of the Court from whose decree this appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his life-time were made or granted by the Government or any other persons to the executors or managers of the Colonel's will, and under what circumstances and for what consideration the same were made.

There remains the subject of costs.

On the first hearing of the cause no costs were given to either party. From the decision of this first Court on the matters in question, Mrs. Orde appealed, and obtained a judgment with costs, from which the present appeal is brought. In the opinion

of their Lordships, Mrs. Orde was wrong on both points ; and further in contending that the fifth share of her father belongs to herself exclusively, she is claiming inconsistently with what was done by the family in the case of George, the illegitimate son of Joseph. Their Lordships see no reason, therefore, why the ordinary rule should not prevail. The difficulty has arisen, not from any uncertainty in the language of the Colonel's will but from the contention of Mrs. Orde that it ought to be interpreted by English law, which has no application. Their Lordships, therefore, condemn Mrs. Orde to pay the appellant's costs in the Court below, the judgment of which is hereby reversed and also to pay the appellant's costs of this appeal. No order is made as to the costs of the respondent Alexander Skinner.

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HIGH COURT.

[FULL BENCH.]

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Mitter, and Justice Sir C. P. Hobhouse, Bart.

GURU GOBIND SHAHA MANDAL AND OTHERS (DEFENDANTS) v.
ANAND LAL GHOSE MAZUMDAR AND OTHERS (PLAINTIFFS).*

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Feb. 4.

Hindu Law—Heir—Paternal Uncle's Daughter's Son—Sapinda.

A father's brother's daughter's son is entitled to be recognized as an heir according to the Hindu law current in the Bengal school.

Gobindo Hureekar v. Woomesb Chunder Roy overruled (1)

THIS was a suit brought on 10th July 1868, before the Moonsiff of Sohur, Zilla Dacca, to recover possession of 1 anna 5 gandas share of a zemindari, left by Gangadhar Ghose, the *sapinda* of the plaintiffs.

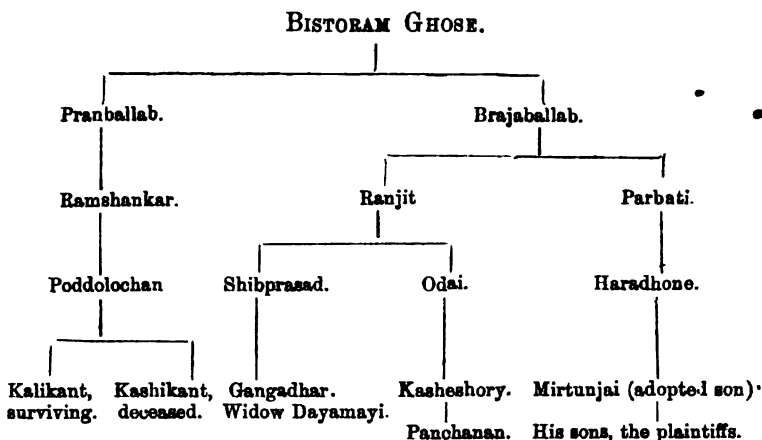
See also
15 B. L. R. 15.
16 B. L. R. 38.

* Special Appeal, No. 1427 of 1869, from a decree of the Subordinate Judge of Dacca, dated the 23rd March 1860, affirming a decree of the Moonsiff of that district, dated the 10th July 1868.

(1) W. B., Sp. No., 176.

1870 The following, which was admittedly the family tree, will make the case more intelligible :

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The plaintiffs alleged that Gangadhar Ghose, grandson of Ranjit Ghose, brother of their great-grandfather Parbati, died in 1271 (1864) leaving the property, which was the subject of suit, and Dayamayi, his widow, him surviving ; that they, plaintiffs, were the legal heirs of the deceased Gangadhar, but had been kept out of possession of the property by the defendants.

The defendants alleged that they had purchased the property from Dayamayi, widow of Gangadhar, who had sold it with the consent of the legal heirs, for the purpose of enabling her to meet the expenses of law suits and other necessary expences, such as would, under Hindu law, render the alienation by her valid.

Before the Moonsiff the defendants first pointed out Panchanan as the legal heir of Gangadhar, but he was Gangadhar's father's brother's daughter's son. The Moonsiff, therefore, referring to *Gobindo Houreekar v. Woomesch Chunder Roy* (1) decided that he could not be heir under the Hindu law.

The defendants then pointed out Kalikant as the legal heir of Gangadhar, and both parties admitted before the Moonsiff that Kalikant and the plaintiffs were *samanodakas*, or " kinsmen allied by common oblation of water." The Moonsiff found that the plaintiffs were descendants of the great-grandfather of Gangadhar, whilst Kalikant was a descendant of the father of the great-grandfather of Gangadhar. The plaintiffs, therefore,

(1) W. R., Sp. No.176.

being "nearest of kin" were the legal heirs. The defendant also pleaded that Mirtunjai, the father of the plaintiffs, had not been legally adopted; they, therefore, could not claim through him as heirs of Gangadhar. This plea was also overruled by the Moonsiff, who further found that the sale by Dayamayi was "illegal and void," and decreed the plaintiffs' suit with costs.

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On appeal to the Subordinate Judge, the Moonsiff's decision was upheld on all points. In the course of his judgment, the Subordinate Judge remarked: "In the case of *Gobindo Huree-kar v. Womesh Chunder Roy* (1) it has been ruled by the High Court, with reference to the principles of Hindu law, that the grandson of a father's brother cannot succeed. The Vayavastha on the points as quoted by Baboo Shama Churn Sircar (2), in the new edition of his book, being opposed to the aforesaid ruling of the Hon'ble Justices of the said Court, cannot be regarded as just and sound, and preferred to the ruling in question. Panchanan, therefore, cannot be reckoned among the heirs." He dismissed the appeal, and decreed plaintiffs' suit.

The defendants then appealed specially to the High Court, relying mainly on the following grounds of appeal:—

1. That the plaintiffs being the fifth in descent from a common ancestor, through adoption, were not connected with the family so as to be entitled to succeed to the property of another branch from the common ancestor of the family.

2. That, according to the Dayabhaga and other authorities, as long as there was a single *sapinda*, or one who offers the cake to any of the three ancestors of the person whose succession is in dispute, the plaintiffs are not entitled to succeed. Such a *sapinda* was Panchanan the grandson (by his daughter, Kashe-shory) of odai, the uncle of Gangadhar, the last full owner.

3. That the purchase from the widow having taken place with the consent of the next of kin, it must be presumed to have been for allowable causes.

(1) W. R., Sp. No., 176,

(2) See *Vayavastha Darpana*, Edition 1867, pp. 276—287.

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The appeal was heard by Bayley and Hobhouse, JJ., who referred the following question for the opinion of a Full Bench ; whether a father's brother's daughter's son is, or is not, included in the succession by the Bengal school of Hindu law ?

The question was referred in the following judgment by

HOBHOUSE, J.—The question is whether the plaintiffs, who are the sons of the adopted son, Mirtunjai, can, in the presence of Panchanan, sue to set aside certain alienations made to the defendants, special appellants, by one Dayamayi, out of the estate of Gangadhar, deceased.

This question is again upon the arguments divided into two parts :—

First.—Whether the plaintiffs, being but descended by adoption and being fifth in descent, can take at all ; and

Secondly.—Whether Panchanan, admitting that the plaintiffs can take at some time or other, is not the preferential heir, inasmuch as he is admittedly in the position of a kinsman who can offer two oblations to the deceased owner Gangadhar ; whilst, on the other hand, the plaintiffs are admittedly only in the position of distant kinsmen.

These points have been very ably argued by Baboo Kali Prasanna Dutt for the defendants, special appellants, and Baboo Ramesh Chandra Mitter for the plaintiffs, special respondents, and we believe that we have had the whole of the authorities bearing upon the said points most fully set before us.

It is admitted by the pleader for the special appellants that, if the adopted son were, in all respects, on an equality with the natural son in the matter of succession, the plaintiffs, the descendants of an adopted son, in this case, would not be out of Court simply because of such descent ; but it is contended that in this matter of succession, the adopted son is not on such an equality ; but that whereas the descendants of the natural son are heirs up to the seventh generation, the descendants of the adopted son are, on the other hand, heirs only up to the fourth generation, so that the plaintiffs, being out of the fifth generation, are not heirs.

This contention is based almost entirely upon an interpretation that is sought to be put upon certain texts and comments thereon to be found in verses 18 to 26 of Section 3 of the Dattaka Chandrika.

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The verse mainly relied on is verse 18, and it is couched in these words :—

“The relation of *sapinda* is next considered. This extends to three degrees : in the family of the natural father, by reason of consanguinity; and in that of the adopter, through connection by the funeral cake.”

Looking to the words used and to the context, this verse seems to me to be at once a proposition laid down by the commentator for consideration, and also a conclusion to which the commentator had arrived; but the question seems to me still to remain as to what the extent of the question was which the proposition was intended to embrace and to conclude.

A text to support the proposition is given in verse 19; then in verses 20 to 23 are given the explanation and the bearing of that text, and the reconciliation of it with apparently inconsistent texts; then in verse 24, the proposition is again laid down almost *verbatim* as in verse 18, as proceeding from some other commentator; and then again in verses 25 and 26 are given a further explanation and the further bearing of the text.

I cannot but conclude from the best consideration I can give to this Section 3, as a whole, that the commentator intended to lay down the proposition, that whilst, in the case of the natural son, the relationship of *sapinda* extended to the seventh degree, in the case of the adopted son that relationship extended only to the fourth degree.

I remark that, in the previous part of the Section, he had been treating of two classes of adopted sons, and of the *status* of these two classes *quoad* one another and the natural sons; and that, just before the introduction of the proposition in verse 18, he had been drawing a comparison between the “*dwyamushyayana*,” or the son of two fathers, and the absolutely adopted son.

He then came naturally to consider these two classes of adopted sons in the relationship of *sapinda*, and thus the proposition

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which follows is made to embrace, as undoubtedly it does embrace, both classes.

He then gives the text and shewes (verse 20) how it applies in both parts only to the son of the two fathers, explaining how he alone takes in six generations, three of the natural and three of the adoptive father (and so verse 25); and in one part only to the absolutely adopted son, showing how he takes in three generations upwards, viz., to the adoptive father, grandfather, and great-grandfather.

Then follows an illustration showing that the taking of the adopted son extends only to three generations, viz., in the case of the grand son by association with the adopted son, the adopter, and the adopter's adoptive father (verse 21).

And lastly he says, the fourth generation of the adopted sons is excluded, because the adopted son, differing from the natural son, is precluded from partaking of "the wipings of the oblations" (verse 22), "and thus the general relation of *sapinda* extending to the seventh degree, which is propounded in the 'Matsya Purana'" (in a text which he quotes), "is barred by the special rule in question," i. e., by the special rule he is propounding (verses 18 and 24). The relationship of *sapinda* "which might be inferred from analogy to the real legitimate son" being not only not established, but prohibited (verse 26).

I think, therefore, that on the authority of the Dattaka Chandrika, on which both parties through their pleaders rely, it must be held that the adopted son is not a *sapinda* beyond the fourth generation, and if not a *sapinda*, then no relative at all after that generation.

It is then contended by the pleader for the special appellants that when the adopted son, as in this case, is thus shown not to be any relative at all beyond the fourth generation, he cannot be an heir; because, under the Hindu system, heirship is dependent on relationship, i. e., on the ability to offer funeral cakes, the wipings, water, and other solemnities by reason of association with generations up or down the family tree.

Looking to the general foundation, on which I shall afterwards have occasion to say that I think succession in the Hindu

family is based, and to the special reasons given as the foundation of the particular system of adoption, it is quite clear to me that, as a general rule, relationship is the foundation of the system of succession, and that the particular system of adoption follows this doctrine, adoption being declared to be "for the sake of the funeral cake, water, and solemn rites" (verse 3, Section 1); and arguing from the foundation of the systems, I should be inclined to hold that, when relationship ceases, then the right of succession must fail; but, on the other hand, I think that if it should be found that, under the practice of the system of adoption, as described in the Dattaka and other authorities, adopted sons may succeed to the inheritance, whilst yet they cannot perform obsequies, and if this practice has justice and equity and the fitness of things to support it, I think it will be our duty to uphold it. I will, therefore, give the best consideration I can to the authorities submitted to us, and will endeavour to discover whether or not there is in these authorities any declaration of a right or practice of inheritance in the adopted son, independent of, and beyond, the time when he ceases to be a relative.

Now, I think, in the first place, that it must be admitted that the provisions of Section 3 of the Dattaka Chandrika apply to the adopted son *quoad* the performance of funeral rites, and these only. Verse 1 expressly says, "next the funeral rites performed by a son given are determined."

And though verse 18 does, in one sense, open out a new subject in the words "the relation of *sapinda* is next considered," yet it is quite certain that, in the following verses of the section, that relationship is considered in connection with funeral rites and not otherwise (verses 21, 22, 23, and 26 expressly referring to one or more of those rites).

Then setting aside the division of the Dattaka Chandrika into chapters as a division made only for convenience sake by the learned editor of the work, we still find that the author himself treats the question of *sapindaship* in direct connection with the question of funeral rites on the one hand, and the cognate question of the impurity of the adopted son the other hand; and that it is not until these questions have been entirely disposed of that the subject of the inheritance of the adopted

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1870 son is commenced upon, a new subject being evidently in the mind of the commentator himself when in Section 5, "On succession by inheritance," he commences with these words: "The inheritance of the adopted son is *next* propounded" (verse 1, Section 5).

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It may then, I think, safely be said that Section 5, taken as a whole, may be regarded in this light. Verses 1 to 18, inclusive, may be said, I think, simply to give various conflicting opinions of writers on the subject of the succession of the adopted son, a word of explanation being put in here and there in illustration of some particular text.

In verse 19, the commentator may be said to be endeavouring to reconcile the conflicting texts he has quoted. Then in verse 20 he quotes what is evidently to his mind the ruling text from Menu.

In verses 21 and 22 he refers again to certain other conflicting texts, and in verses 23 and 24 seems to me to give that conclusion of his own, by which, as he is the ruling authority, we are bound.

"Of the man" (Menu says, verse 20) "to whom a son has been given, adorned with every quality, that son shall take the heritage."

Then the commentator explains that it is by reference to this expression "adorned with every quality" that seeming contradictions of various writers are reconcilable, and he concludes in verse 24 thus:—"Therefore, by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, where such son may not exist, the adopted son takes the whole estate even."

I think myself that this last passage is not only conclusive on the point before us, but that it is in consonance with the tenor of such texts as I have been able to collate from the great law-giver Menu, with the whole polity of the system of adoption, with the opinions of men learned in the matter, with the tenor of the decisions of the Courts, and with the principles of justice and equity.

In Chapter IX, Institutes of Menu, verses 158 to 160, I find

that "of the twelve sons named by Menu, six are kinsmen and heirs;" and that "a son given" is mentioned as one of these who is of the number "of the six kinsmen and heirs," and heirs not to their own adoptive fathers only, but to collaterals also.

In the Dattaka Chandrika, verse 1, Section 3, I find a text which seems to say that, except in the event of the subsequent birth of a legitimate son, "the adopted son in every respect." (and this would seem to throw a doubt even in the extent of the *sapinda* relationship *quoad* funeral rites) "resembles the real legitimate one."

Again, in Note 20, page 227 of the same authority, I find the learned commentator on this authority maintaining the opinion that the restriction to the third generation of the adopted son refers not to succession to collaterals, but to funeral rites and the like only.

Again, as indicating the polity of the system of adoption, I find that, after adoption, the adopted son resembles, as in every respect, the natural son; that the filial relationship (in the absolutely adopted son which is the case before us) with the natural family, both as regards succession and family ties and duties, has entirely ceased; and that, in fact, he has ceased to be a member of his natural family, and is incorporated, as if he were a blood relation unable to intermarry, with his adopting family (Dattaka Chandrika, verses 18 and 19, Section 2; verse 1, Section 3; verse 7, Section 4; Macnaghten's Hindu Law, Volume I, pages 69 and 70).

And so the decisions of the Courts. The adopted son, it has been held, succeeds both lineally and collaterally, and the reason is that he becomes for all purposes the son of the (adoptive) father—*Sumbhoo Ghander Chowdhry v. Narain Debia* (1). There being no son of the body, the adopted son "represents" his adoptive father, and is entitled to the share which his father "would have obtained"—*Tara Mohun Bhattacharjee v. Kripa Moyee Debia* (2). "An adopted son has all the rights and privileges of a son born" succeeding as a son of the body would "to the *stridhan* of his adoptive mother"—*Teencowree Chatterjee v. Dinonath Banerjee* (3).

(1) *Suth. P. C.*, 25.

(2) 9 *W. R.*, 423-25.

(3) 3 *W. R.*, 49.

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And so the equity and justice of the case; for when the adopted son we are discussing is debarred, by reason of adoption, from ever claiming either in himself or in his heirs any portion of the estate of his natural father (verses 18 and 19, Section 2, Dattaka Chandrika; and Macnaghten's Hindu law, Volume I, page 69, &c.), it is obvious that justice demands that to the same decree that he was heir to his natural father, to that decree he should be heir to his adoptive father.

On a careful review, therefore, of the authorities, I would give the first issue in favor of the special respondents.

I address myself to the second question that is before us, and here I find myself at issue with opinions given by no less than six Judges of this Court, and amongst these Judges, by our late colleague, Mr. Justice Pundit.

I need hardly say with what hesitation and unwillingness I have arrived at an opinion different from that of these learned Judges, and especially, on such a point, from that of the late Mr. Justice Pundit; and but that my learned colleague Mr. Justice Bayley shares this difference of opinion, I believe I should myself have waived it in deference to the other opinions I have alluded to.

But, as it is, the subject is so important, and involves a question so vital to the Hindu family life, that Mr Justice Bayley and I are agreed that it is our duty to submit our own judgments upon it for the consideration and determination of a Full Bench.

I purpose to consider first, the various decisions of this Court that are adverse to our view, and then the text of the various recognized authorities upon the subject.

The first reported case is that of *Goorogobindo Chowdhry v. Hureemadhub Roy* (1), and though it is not very clearly stated in the preamble, the question there seems to have been whether the father's brother's daughter's son, or the son of a son's son, was the preferential heir. The learned Judges (Seton-Karr and Campbell, JJ.), maintaining a judgment of the learned Judge (Jackson, J.) of Rajshahye, held that the son of a son's son was to be preferred. The grounds on which

(1) Mar. Rep., 398.

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the learned Judges based their decision seem to me to have been shortly these : they considered that, in Hindu law, the succession through females was quite exceptional ; that the Hindu law, like that of ancient Rome, was, in its regulation of descent, agnatic ; that most relations through females were excluded ; that the succession of the daughter or the daughter's son was an anomaly ; that whilst the Benares School was against succession of this nature, the authorities of the Bengal School were not consistent, nor unanimous in admitting them ; that the presumption, therefore, was against the succession of the son of a daughter ; and that the presumption had not been rebutted by any sufficient authority or established practice shewn. Virtually the learned Judges held in this case, that the brother's daughter's son was excluded from the inheritance, and the main principle on which they based their decision was (as they held) that doctrine of the Hindu system of succession by which succession through a female was quite exceptional.

It seems to me, after the best consideration I can give to the received authorities, that the principle relied on cannot, in any sense, be held to be a principle which at all regulates the Hindu law of succession. A single glance at the table of succession in the Dayakrama Sangraha shows that out of the forty-two enumerated kinsmen who are heirs, there are no less than five who, being females, are mentioned as direct heirs, and no less than ten who being males, are mentioned as taking through females, *i. e.*, a proportion of 15, out of 42 enumerated heirs, are themselves females, or taking directly through females. And again, as I hope to show hereafter, the question of sex as only, it seems to me, if it has any bearing at all, the most indirect bearing upon the system of the Hindu succession ; but rather that system is based, not upon any question of this or that sex, but upon the religious foundation of oblations. For instance, daughters having or likely to have issue, succeed, because they confer "benefits " on the deceased owner by presenting to him, through their sons, " funeral oblations at solemn obsequies : " (verse 4, Section 3, Chapter I, Dayakrama Sangraha). But on the other hand, "daughters " who are barren, or widows destitute of male issue, are incompetent to succeed, because they cannot benefit the deceased owner

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“ through the medium of sons by offering the funeral oblations:” (verse 5, Section 3). So, in my judgment, it is not as a rule the sex of the parent, but the competency of the particular person whose case is being considered to offer or not to offer funeral oblations to the deceased owner, that is the test of heirship. It is not, in short, to apply the doctrine, because he is the brother’s daughter’s son, but because he can, or cannot offer oblations to the deceased, that the brother’s daughter’s son is or is not an heir.

Seeing, therefore, that the judgment of which I have been speaking was, as it seems to me, based on a misconception of the main principle which governs the Hindu law of succession, I cannot subscribe to that judgment ; and as it is obvious that the judgments in *Choorahmonee Bose v. Prosonno Oommar Mitter* (1) and *Rajdoololl Sircar, Appellants* (2), simply followed, without any discussion, the ruling to be found in *Gobindo Hureekar v. Woomesch Chunder Roy* (3), I shall proceed at once to consider that ruling.

That ruling is, no doubt directly in point ; and the learned Judges (Norman, Officiating Chief Justice, and Kemp and Pundit, J. J.) distinctly held that a brother’s daughter’s son was excluded from the succession.

The judgment concisely stated seems to me to have proceeded on three considerations, viz., that the father’s brother’s daughter’s son was not enumerated in the *Dayabhaga* in the order of heirs : that the text in the *Dayakrama Sangraha*, in which such son was enumerated, which was the text on which every learned writer of modern times had relied, was an interpolation ; and that inasmuch as these facts were so, therefore, the brother’s daughter’s son, whatever might be the consequences to the Hindu family, must be held excluded.

As I have said before, with such authorities against me, I have hardly been able to persuade myself that I ought to maintain a different opinion ; but the more I have consulted the original Text Books, and have considered what I conceive to be the basis of the system of the Hindu law of succession, the more convinced I am

(1) 1 W. R., 43. (2) Unreported. (3) W. R., Sp. No., 176.

that the position taken up by the learned Judges is as assailable a law, as it is by their own admission on the principle, which, as a rule, governs the Hindu family life. I doubt first of all whether the fact (and it is admittedly a fact) that the father's brother's daughter's son is not enumerated in express terms in the Dayabhaga, as amongst the heirs, of necessity excludes him, and I observe that under the cognate system of the Mitakshara, the absence of such enumeration does not exclude (1). I would then first observe that the brother's daughter's son is not one of those enumerated as persons excluded from the inheritance (see Chapter III of the Dayakrama and Chapter V, Dayabhaga), and if not excluded, then is he not included? But more than that, I observe that Chapter V of the Dayabhaga on "exclusion from inheritance" was written with an express purpose, and that purpose is declared as well in the closing as in the opening part of the Chapter, as follows: "In the next place persons incompetent to inherit specified," why? "for the purpose of making known by the exception, competent heirs."—Verse 1, Chapter V, page 101. Then the author describes who are incompetent heirs, and the foundation of such incompetency, and concludes (verse 20): "Thus it has been explained who are persons incompetent to inherit."

Then taking the Chapter as a whole, the foundation of incompetency is it seems to me, the inability from one cause or another to perform funeral obsequies; and on the other hand, the right to inherit is expressly declared to be the reward of benefits conferred (verse 6); and if I am right in my reading of this Chapter, two propositions seem to me to follow: *first*, that every one is competent to inherit who is not by this Chapter declared incompetent; and *secondly*, that every one who can present funeral obsequies is competent to inherit. And in the face of this Chapter on exclusion, and the declared purpose of it, it cannot, I think, be logically said that, in a subsequent Chapter in regard to "succession" (Chapter XI), the author of the Dayabhaga intended to exclude from the inheritance all those persons whom he does not expressly

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(1) See 2 B. L. R., F. B., 36, 37.

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enumerate ; neither will the Chapter itself, I think, on a careful examination, bear any such construction. In the first place, there are passages in the Chapter in which the enumeration is expressly not complete, as, for instance, in verse 13, Section 6, page 216, where the author speaks "of the maternal uncle and the rest." Then the recapitulation by Srikrishna, in page 224, is clearly not complete, for the same author in the Dayakrama Sangraha, as may be seen by a comparison of his recapitulation here, with the succession table there, omits in the recapitulation many heirs who appear in his treatise, and the table drawn therefrom. And, then, the whole foundation of succession, as laid down in this Chapter repeatedly, requires many persons to be enumerated as heirs who are yet not so enumerated ; and I remark that the learned author of the Vayavastha Darpana affirms that there are thirty-one such heirs omitted in the Dayabhaga, but enumerated in other Commentaries of equal or superior acceptance (Vayavastha Durpana, edition 1867, page 280).

The great principle on which, I think, we can gather that the law of succession, as detailed in this Chapter of the Dayabhaga, proceeds, is that which I have already quoted ; and it is this, namely, that the right to inherit is the reward of spiritual benefits conferred on the deceased owner of the property, and that the order of the procession of inheritance depends, as a rule, upon the extent of those benefits. Thus we have the oft-repeated text of Menu, as governing the whole system—"to three must libations of water be made ; to three must oblations of food be presented" (Chapter XI, section 6, verse 7 and 10),—applied to heirs up to the fifth degree ; and, to take the case nearer home to the point before us, we have the brother succeeding by reason that he offers three oblations (Chapter XI, Section 5, verse 4) ; the brother's sons and grandsons preferred to the paternal uncle, because they present nearer oblations (Section 6, verses 5 and 6) ; and the brother's great grandson rejected, as too remote, because he is not a giver of oblations (Section 6, verse 7). And though it is true that we do not find the father's brother's sister's son, as many other such like kinsmen, enumerated by Srikrishna in his recapitulation, yet we do find this general principle that I have here alluded to, broadly and distinctly laid

down in these terms, namely : that it is only " on failure of all
 " such kindred who present oblations in which the deceased owner
 " may participate, that the succession devolves on the maternal
 " uncle and the rest," who present lesser oblations and, long after
 them, on the *sakulaya*, or distant kindred (page 225).

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• My judgment then is, that the absence of any express mention
 of the father's brother's daughter's son in the enumeration of
 heirs in Chapter XI of the Dayabhaga is no sufficient reason for
 holding that such son is not an heir ; and I will go further and
 say that, in my judgment, the absence of any mention of such son
 in the enumeration of excluded persons in Chapter V, and
 the declaration, if I am right, of that great principle on which
 succession is based (a principle by which the son in question as
 presenting two oblations is manifestly entitled to the inheritance)
 throws the *onus* on the other side to show why the said son
 should be excluded.

I return, however, to the judgment I am discussing, and I have
 only now to consider that part of it which bases the exclusion
 of the father's brother's daughter's son on the assumed interpola-
 tion of the text in the Dayakrama Sangraha by which the said
 son is expressly included in the inheritance.

I quote underneath the verses (1, 2, 3, Chapter I, Section 10,
 Dayakrama Sangraha,) including that verse (2) in which the in-
 terpolation is said to occur ; and I contend, first of all, that to my
 mind it is very doubtful whether verse 2 is an interpolation at all ;
 and secondly that if it is so, the fact is not conclusive of the law

Verse 1.—" On failure of the brother's grandson, the succes-
 " sion goes to the father's daughter's son, for he presents three
 " funeral oblations, namely, to the father, paternal grandfather,
 " and paternal great-grandfather of the deceased owner ; *i. e.*, to
 " his own maternal grandfather, maternal great-grandfather, and
 " maternal great-great-grandfather. (According to Acharya
 " Chudamani, the son of the proprietor's own sister, and the son
 " of his half sister, have an equal right of inheritance)."

Verse 2.—" In default of the father's daughter's son, the
 " brother's daughter's son succeeds, for he presents two funeral
 " cakes in which the deceased owner participates, namely to his
 " (the owner's) father and paternal grandfather."

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Verse 3.—"Failing him, the paternal grandfather is the successor, for as the father is entitled to succeed on a failure of the heirs of the deceased owner, ending with the daughter's son, so by the rule of analogy the succession devolves on the grandfather in default of heirs down to the father's daughter's son; and because he presents one oblation (namely, to the owner's paternal great-grandfather, i. e., his own father) in which the deceased owner participates."

Now, on considering the wording of the verses I have quoted, and generally of the verses in this treatise, speaking in detail of the order of succession, it will be found that each verse naturally divides itself into two parts: the first, declaratory of the law; the second, explanatory of the ground on which that law is founded. Thus, verse 1:—"On failure of the brother's grandson, the succession goes to the father's daughter's son." This is declaratory of the law, and is the first part of the verse. "For he presents three funeral oblations, &c." This is explanatory of the ground on which the law is founded, and is the second part of the verse. And so, in verse 2, it is first declared that "failing the father's daughter's son, the brother's daughter's son succeeds," because it is explained, he "presents two funeral cakes." And so, in verse 3, it is declared that "failing the brother's daughter's son, the paternal grandfather succeeds," because it is explained, "of the analogy between him and the father, and because he presents one oblation."

It is in the words descriptive of the analogy that the difficulty of the passage in verse 3 consists; but if I am right in disconnecting the declaratory from the explanatory part of the verse, that difficulty seems to me to disappear, because, whether the explanations be good or bad, consistent or inconsistent, they are still nothing more than explanations, and they are at the least explanations quite consistent with that policy on which, if I am right, succession proceeds,—the policy which makes succession depend, as a general rule, upon the number of oblations that can be presented, and which would, therefore, when applied to the case before us, prefer the father's brother's daughter's son as presenting two oblations to the paternal grandfather, as presenting only one oblation.

Then, on considering the succession in verse 3 with those successions which precede and those that follow it, and with other similar successions declared in the table of the Dayakrama Sangraha, it is at once manifest that the succession declared in verse 2 is not only in its exactly appropriate place, but is in perfect harmony with the whole table of succession. Omit it, indeed, and there would be discord and inconsistency. It not only succeeds verse 1 because of the presentation of only two oblations, and for that same reason precedes verse 3, but it chimes in exactly with those subsequent successions: numbered 19 and 20, and 26 and 27 in the table, about which there is no dispute. It is said, however, that this fact indicates only the ingenuity of the interpolations, but on this I would remark that, on such reasoning, you might argue away successions, 19 and 20 and 26 and 27 also, and indeed would arrive at that *reductio ad absurdum* by which you would be obliged to hold that the greater the fitness of a text in any work the more certain the interpolation.

It is then said that the passage is admittedly an interpolation, and a *vayavastha*, to be found at page 77 Macnaghten's Hindu Law Volume II, is relied on; but here, again, the answer is that it is only wanting in some and not in all copies of the Dayakrama Sangraha; that we have no direct, nor, as I would contend, any indirect evidence of interpolation; that we do not know that the verse, even if an interpolation, does not yet declare what has been the recognized law for years; and that, at least, this we do know that such an authority as Macnaghten, with his eyes open to this alleged interpolation, did yet determine to recognize the same as apart of the true text (Macnaghten's Hindu Law, page 31, Volume I).

Again, in considering the words used in the verse descriptive of the analogy, it should not be forgotten that the analogy between the father and grandfather is not a complete analogy; that whereas in the one case it descends and ascends lineally, in the other it first branches off to the mother, then again to the brother and his son and grandson, and then again to the father's daughter's son; and if reason, which we are told is to guide us, where texts and commentators differ in matters of Hindu law, is to be followed, then we should, undoubtedly, expect the father's

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1870 brother's daughter's son to intervene exactly where the alleged interpolated verse would make him intervene in order of succession.

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To the best of my judgment then I cannot say that the verse in question is an interpolation; for to sum up, if it be true that it is wanting in some copies of the original, it is still present in others; it is not irreconcilable in itself or with its context; it occurs in its appropriate place; it has been deliberately accepted by a great authority (Macnaghten), and it is perfectly in harmony with what I conceive to be the basis on which the Hindu system of succession and the Hindu family as an institution, is founded.

But even if it be conceded that this particular verse be an interpolation, still the Hindu system of succession, on which the text is based, does to my mind remain declared and accepted, and is thoroughly in accordance with the interpolation. "During the life-time of parents," the heirs are not entitled to the inheritance, "because they do not confer any spiritual benefit on the deceased" (Dayakrama Sangraha, Section 1, verse 4 Chapter I). The daughter succeeds, because, through her son, she presents oblations to the father (Section 3, verse 1). The daughter's son succeeds, because he offers such oblations (Section 4, verse 1). The mother succeeds, because she gives birth to those who offer such oblations (Section 6, verse 2). The grandfather's daughter's son succeeds, because he presents two oblations, and so the uncle's daughter's son and the paternal grandfather's daughter's son (verse 8, 9, 13, Section 10). And it is not until "failure of the heirs who present oblations in which the deceased owner participates that the remote kinsmen (*sakulaya*) take" (Section 10, verse 21). Thus far the Dayakrama Sangraha, and in like manner the Dayabhaga, but the particulars are even more precisely given in the latter. The kinsmen, *sapindas*, generally first take, and not till after them the *sakulayas*, or distant kinsman (Chapter XI, Section 1, verse 5, and verses 37 to 40). The nearer the oblation, the greater the preference (Chapter XI, Section 6, verses 5 and 6). The brother's great-grandson does not succeed as a *sapinda*, because, being in the fifth degree, he

is not a giver of oblations (Chapter XI, Section 6, verse 7). According to Menu : "To three must oblations be made," and these first take ; "to the nearest kinsmen (*sapinda*) the inheritance next belongs," and not until failure of these do the distant kinsmen (*sakulaya* or *samanodaka*) come in (Chapter XI, Section 6, verses 10, 13, and 15.) And verse 17, Section 6, is particularly positive, declaring, on the authority of Menu, that "the fifth in descent not being connected by a single oblation is not an heir, so long as a person, connected by a single oblation, whether sprung from the father or the mother's family exists." And nearness of kin depends not on birth, but "on superiority of benefits by presentation of oblations" (verse 18) ; therefore, such a kinsman is a preferential heir (verse 19) ; and it is only after such that the *sakulayas* come in (verse 21). The rule including all kinsmen (verses 28 and 31). And finally, in the recapitulation of the passage I have already quoted,—“On failure of all such kindred (as those) who present oblations in which the deceased may participate,” the succession devolves first on those who present lesser oblations, and finally on *sakulayas* (page 225). And so Colebrooke's Digest, Volume IV, pages 159, 175, 181, 190, 226, 228, and 234.

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Excluding then the supposed interpolated verse, I still find that, on the authorities quoted, the father's brother's daughter's son is included in the succession ; and I would answer the second issue before us in the defendant's (special appellant's) favor, and would dismiss the plaintiff's suit with costs. But this must be dependent on the decision of the Full Bench.

BAYLEY, J.—I concur in the reference to the Full Bench, for the reasons stated in the above judgment.

Baboo *Kali Prasanna Dutt* and *Krishna Dayal Roy* for appellants.

Baboo *Ramesh Chandra Mitter* and *Girija Sankar Mazumdar* for respondents.

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The arguments, with the cases and authorities in support of them, are sufficiently referred to in the judgment of the Full Bench.

The judgments of the Full Bench were as follows :—

MITTER, J.—The question which we are required to determine in this case is whether, under the Hindu law current in the Bengal school, the son of a paternal uncle's daughter is entitled to succeed to the estate of a deceased Hindu, if no nearer heirs are forthcoming.

The solution of this question depends upon the true construction of the Dayabhaga, and treatise on the Hindu law of inheritance by Jimuta Vahana, the acknowledged founder and chief of the Bengal school. The other authorities current in that school, such as the Dayakrama Sangraha of Srikrishna Tarkalankar, the Daya Fatwa of Raghunandan, and the Vivada Bhangamul of Jagarnatha Tarkapanchanana, are all of them almost exclusively founded on the Dayabhaga ; and such difference of opinion as there is between them and the fundamental treatise is entirely confined to a few cases of detail which involve no conflict of principle of any kind whatever. Such then being the state of our authorities, it is necessary, first of all, to ascertain whether the Dayabhaga itself is founded on any general doctrine of principle, which will enable us to arrive at a satisfactory conclusion on the point now under our consideration. We are of opinion that there is such a principle, and that it is no other than that of spiritual benefit. That the Hindu law of inheritance, in the widest acceptance of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor, is a proposition beyond all dispute. All the ancient Rishis, or Hindu sages, whose texts are regarded as the fundamental source of that law, and all the commentators on it whose opinions are recognized as authorities in the different schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not as their exclusive, guide. The author of the Daya-

bhaga is no exception to the rule. On the contrary he is clearly and expressly of opinion, as we will presently show, that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle alone that questions relating to it must be determined. It is to be borne in mind that the Mitakshara, or rather Benares school of Hindu law, was the dominant school in Bengal when the Dayabhaga was written, and that some of the lawyers of that school were of opinion that the word *sapinda*, as used by Menu, indicated mere consanguinity, and not the power of conferring spiritual benefit. The author of the Dayabhaga, as the founder of a new school, expressly repudiates this doctrine, by declaring that the nearness of kin indicated by Menu is absolutely dependent on the presentation of offerings. "Nor should it be pretended," he says, Colebrooke's Dayabhaga, verse 18, Section 6, Chapter XI, "that the text of Menu (to the nearest *sapinda*, male or female, the inheritance belongs) is intended to indicate nearness of kin according to the order of birth, and not according to the presentation of offerings, for the order of birth is not suggested by the text. But Menu declaring that oblations of food as well as libations of water are to be offered to three persons, and that the fourth in descent is the giver of oblations, but neither is the fifth in ascent a receiver of offerings, nor is the fifth in descent a giver of them, thus declares nearness of kin, and shows that it depends on superiority of (benefits by) presentation of oblations." We shall have occasion hereafter to comment at length upon the text of Menu referred to in this verse, but what we wish to be particularly borne in mind for the present is that, according to that text, as interpreted by the author of the Dayabhaga, the nearest heir is he who is competent to confer the greatest amount of spiritual benefit on the soul of the deceased proprietor. "It is by wealth," he says in verse 13 of the same section, "that a person becomes a giver of oblations. Two motives," he continues in the same verse, "are indeed declared for the acquisition of wealth, one temporal enjoyment, the other the spiritual benefit of alms and so forth. Now since the acquirer is dead, and cannot have temporal enjoyment, it is right that this wealth should

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"be applied to his spiritual benefit." Then again in verse 29 of the same section he says, "inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit," and the same principle is laid down still more clearly and emphatically in the preceding verse, which says, "therefore, such order of succession must be followed as will render the wealth of the deceased most serviceable to them."

In order to remove all reasonable doubts on a point of such capital importance, we think it necessary to make a few observations on the mode in which the principle of spiritual benefit has been actually worked out in the Dayabhaga. The work purports, on the face of it, to be a treatise on the partition of heritage; but it is really divisible into two distinct branches, one relating to the subject of partition among co-heirs, the other to the order of succession to be followed when different persons are claiming the same estate by right of inheritance. The first of these two branches has no material bearing on the point involved in the present discussion, and we will, therefore, confine our remarks entirely to the second.

Now it is beyond all dispute, that the whole of this portion of the Dayabhaga is nothing but a mere elaboration of the doctrine of spiritual benefit. Every point for which a discussion is thought necessary is ultimately determined by that doctrine; and it is by that doctrine that every difficulty is ultimately removed. The texts of Menu and various other Hindu sages are frequently cited, it is true, as the highest authorities on Hindu law; but it is by the light of the doctrine of spiritual benefit that every one of those texts is interpreted, and it is by that light that every discrepancy existing between them is reconciled. If examples are necessary, we have only to go through Chapter XI of the Dayabhaga, which contains the whole law of inheritance relating to the estate of one who has left neither sons, nor grandsons, nor great-grandsons. It will be seen, that the first and most prominent characteristic of the order of succession laid down in this Chapter, is the studious exclusion of female relatives generally. It is to be borne in mind that these relatives are as a class disqualified by their sex

to perform the religious ceremonies prescribed by the Hindu shastras for the promotion of the spiritual welfare of a deceased individual; and hence it is that the author of the Dayabhaga has generally excluded them from the category of heirs. The few that are allowed to come in are allowed to do so on the authority of special texts, but even in their case the doctrine of spiritual benefit is expressly put forward as the ultimate reason for the selection. Thus, for instance, the widow is no more competent than other relatives of her sex to perform the ceremony of the Parvana Shrad, to which we shall have to refer more specifically hereafter; but she is, nevertheless, according to the author of the Dayabhaga "half the body of her deceased husband;" and the consequences of all her acts whether virtuous or vicious must be necessarily borne by his soul. It is for this reason that she is recognized as an heir, and it is by the light of that reason that the numerous conflicting texts bearing upon her case are reconciled with one another. "Since by these and other passages," he says, Colebrooke's Dayabhaga, verse 44, Section 1, Chapter XI, "it is declared that "the wife rescues her husband from hell, and since a woman "doing improper acts through indigence causes her husband to "fall into a region of horror, for they share alike the fruits of "virtue and vice, therefore the wealth devolving on her is for the "benefit of the former owner, and the wife's succession is "consequently proper." The discussion on the question of precedence between the widow on the one side, and the son, the grandson, and the great-grandson on the other, is significant. If the widow is really half the body of her husband, how is it that sons, grandsons, and great grandsons are allowed to supersede her? The author of the Dayabhaga answers this objection by stating that the power of the widow to confer spiritual benefit commences from the date of her husband's death, whereas sons, grandsons, and great-grandsons confer such benefit from the moment of their birth,—see verse 43, Section 1, Chapter XI. The next exception made is in the case of the daughter; and she is allowed to come in because she can confer great spiritual benefit on her father, by giving birth to a son who will deliver

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him and his ancestors from hell, and hence it is that those daughters who are barren or childless widows are carefully excluded from the line of inheritance. The maiden daughter is allowed to come in first, because her marriage might be delayed on account of indigence beyond the age of puberty, and the salvation of her father's soul and of those of his ancestors might be thereby jeopardized; so that even here the spiritual welfare of the deceased proprietor is distinctly recognized as the ultimate ground of the decision. The same remarks are also applicable to the mother, the grandmother, &c., for it will be seen that in each of these cases, some peculiar spiritual benefit or other is invariably put forward as the basis of the discussion. As to the male heirs, we may divide them for the sake of convenience into the following classes:—

1. *Sapindas* strictly so called, or in other words relatives connected through the medium of undivided oblations.
2. *Sakulayas*, or relatives connected through the medium of divided oblations.
3. *Samanodakas*, or relatives connected by libations of water.
4. Certain specified strangers, commencing with the spiritual preceptor, and ending with the learned Brahmin of the same village, leaving aside the king, who is entitled to come in more by right of escheat than by that of inheritance.

Here again we find that the same principle is in operation throughout. The *sapindas* are allowed to come in before the *sakulayas*, because undivided oblations are considered to be of higher spiritual value than divided ones; and the *sakulayas* are in their turn preferred to the *samanodakas*, because divided oblations are considered to be more valuable than libations of water. The members of the last class are not competent, it is true, to offer either oblations of food or libations of water; but even in their case the doctrine of spiritual benefit is not forgotten. Thus, for instance, the lowest amongst them, namely the learned Brahmin of the same village, is allowed to come in upon the express ground that the virtue of the deceased proprietor "is renewed by the acquisition of fresh merit through the circumstance of his wealth devolving on a Brahmin:" (verse 26, Section 6, Chap-

ter XI). This, no doubt, is an extreme case of the kind ; but we wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the Dayabhaga to provide for the spiritual welfare of a deceased proprietor. Again, when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, we find that the same principle is always kept in view. Thus among the *sapindas*, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only ; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison to the second. Similarly those who offer larger numbers of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description ; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones. The same remarks are equally applicable to the *sakulayasa samanadokas* ; but it would be tedious to enter into further details.

Having shown by the preceding observations that the principle of spiritual benefit is the sole foundation of the theory of inheritance propounded in the Dayabhaga, we proceed to determine whether the particular claimant before us, namely the son of a paternal uncle's daughter, is competent to confer any such benefit on the deceased proprietor. We are of opinion that he is, and we may add that this point was not even contested before us by the pleader for the respondent.

That the paternal uncle's daughter's son of a Hindu is one of his *sapindas*, is a proposition beyond all controversy. The whole doctrine of *sapinda* is contained in the following passage of the Dayabhaga :

" Since the father and certain other ancestors partake of three funeral oblations as participating in the offering at obsequies, and since the son and other descendants to the number of three present oblations to the deceased (or to be shared by his *manes*) ; and he who while living presents an oblation to an ancestor, partakes,

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“ when deceased, of oblations presented to the same person ; there-
fore, such being the case, the middlemost of seven who, while
living, offered food to the *names* of ancestors, and when dead
partook of offerings made to them, became the object to which
the oblations of his descendants were addressed in their life-time
and shares with them, when they are deceased, the food which
must be offered by the daughter’s son and other descendants
beyond the third degree. Hence, those ancestors to whom he
presented oblations, and those descendants who present oblations
to him, partake of an undivided offering in the form of (*pinda*)
food at obsequies. Persons who partake of such offerings are
sapindas.”—Colebrooke’s *Dayabhaga*, Chapter XI, Section 1,
verse 38.

It is clear from the above passage, that if two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors ; and hence it is that the person who offers those oblations the person to whom they are offered, and the person who participates in them, are recognized as *sapindas* of each other. That this definition of *sapinda* (is good for all purposes of inheritance is conclusively shown by the very next verse, which says :

“ This relation of *sapindus* (extending no further than the fourth degree) as well as that of *sakaluyas*, has been propounded relatively to inheritance.”—Colebrooke’s *Dayabhaga*, Chapter XI, Section 1, verse 39.

In order to apply this definition to the particular case under our consideration, we think it necessary to make a few preliminary observations on the ceremony of the Parbana Shrad, which has been already referred to in an earlier part of this judgment. This ceremony consists in the presentation of a certain number of oblations, namely one to each of the first three ancestors in the paternal and maternal lines respectively ; or, in other words, to the father, the grandfather and the great-grandfather in the one line, and the maternal grandfather, the maternal great-grandfather, and the maternal great-great-grandfather in the other. It is for this reason that this ceremony is frequently

referred to in the Dayabhaga under the name of the *Troipurosik Pind*, or Pind relating to three ancestors ; and it is through the oblations presented at this ceremony, that the relation of *sapinda* propounded in that treatise admittedly arises. Every Hindu is bound by his religion to perform this ceremony, for his own salvation, which is intimately connected with that of his ancestors, is absolutely dependent on such performance ; and of all the ceremonies prescribed by that religion, it is, therefore, the most important.

Such then being the nature of the Parbana Shrad, and of the obligation to perform it, it is clear that the deceased proprietor was just as much bound to fulfil that obligation as his paternal uncle's daughter's son, who is now claiming his estate by right of inheritance. Now, it is obvious, from the very position of the parties, that the maternal great-grandfather and the maternal great-great-grandfather of the latter are no other persons than the paternal grandfather and the paternal great-grandfather respectively of the former ; and the conclusion is, therefore, inevitable that they are *sapindas* of each other according to the strictest interpretation of the Dayabhaga. The deceased proprietor was bound to offer funeral cakes to his own paternal grandfather and paternal great-grandfather, during his lifetime ; and he is, therefore, entitled, after his death, to participate in the cakes that are now offered to those very persons by the son of his paternal uncle's daughter.

But there is another mode for arriving at the same conclusion. The deceased proprietor, it will be seen, was the grandson of the maternal great-grandfather of the appellant ; and it is admitted that the grandson of the maternal great grandfather, is entitled to inherit as a *sapinda* according to all the authorities current in the Bengal school. If, therefore, the deceased proprietor was a *sapinda* of the appellant, it would necessarily follow, from the very definition of that term, that the latter is also a *sapinda* of the former, for if A. is connected with B., through the medium of undivided oblations, the conclusion is irresistible that B is also connected with A. through the same medium. There is, however, an important distinction between the two cases, to which particular attention is required. The oblations which the deceased

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proprietor would have offered to his own paternal grandfather and paternal great-grandfather would have gone to the maternal great-grandfather and the maternal great-grandfather of his paternal uncle's daughter's son ; whereas the oblations offered by the latter to his own maternal great-grandfather and maternal great-great-grandfather would go to the paternal grandfather and the paternal great-grandfather of the former. Now, it has been already observed that, according to the Dayabhaga, oblations offered to paternal ancestors are of higher spiritual value than those offered to maternal ancestors, so that it is clear that the appellant is a much nearer *sapinda* of the deceased proprietor than the deceased proprietor was of the appellant.

Having shown by the foregoing observations, that the son of a paternal uncle's daughter is fully entitled to come within the principle of spiritual benefits which constitutes the fundamental basis of the law of inheritance propounded in the Dayabhaga, we will now proceed to examine the various objections that have been urged before us against his right to succeed as an heir.

It has been contended that the son of a paternal uncle's daughter has been nowhere mentioned as an heir in the Dayabhaga. We are of opinion that this objection is entitled to no weight whatever. Every one who has gone through the Dayabhaga must have perceived that the specific enumeration of each individual heir was not the object which the author had in view. It is perfectly true, that a few of the heirs have been mentioned by name here and there ; but the great majority of them have been left to be determined by the application of the principle of spiritual benefit. Thus of the numerous relatives who are entitled to come in as *sapindas* by virtue of their right to offer oblations to the maternal ancestor of the deceased proprietor, the maternal uncle is the only one who has been mentioned by name. Then again among the *sakulayas*, or kinsmen connected by divided oblations, the grandson's grandson is the only person who has been specifically enumerated ; and of the *samanodakas*, or kinsmen connected by libations of water, not one even has been so enumerated. In the face of all these facts, it is impossible to contend that the mere absence of specific enumeration is any ground whatever for excluding one single individual who is

really competent to fulfil the conditions of heirship laid down in the Dayabhaga itself. It has been further contended that the order of succession specified in the Dayabhaga down to the *sakulayas* is so precise and complete by itself, that there is no room left for the introduction of the paternal uncle's daughter's son, who, if he is entitled to come in at all, must come in among the earlier class of heirs, namely, the *sapindas*. We are of opinion that this objection, too, must fail. If the Dayabhaga were a work of the same character as the Dayakrama Sangraha of Srikrishna Tarkalankar, which does not pretend to do anything more than to lay down a mere table of succession, or categorical list of heirs, there might have been some foundation for this argument. But when we consider that the real object which the author of the Dayabhaga had in view, was to establish a general principle of his own, and not to go through all the particular applications of that principle, as is evident from our answer to the first objection, it is impossible to attach any weight whatever to an argument of this sort. If the claimant in this case had been the son of a maternal uncle's daughter, or some other relative of the same description, who is merely competent to offer oblations to the maternal ancestors of the deceased proprietor, no such objection could have been possibly urged against him, according to the strictest interpretation of the Dayabhaga. Why then are we to suppose that the author of that work intended to exclude the son of the paternal uncle's daughter, when it is beyond all question that he is competent to offer oblations to a much higher class of ancestors, namely, the paternal? Why in fact are we to suppose that the enumeration of the one class of *sapindas* was intended to be exhaustive, whilst that of the other and a far inferior class was intended to be merely illustrative? If doubts are still entertained on this point, we have only to refer to the provisions of verse 19, Section 6, Chapter XI of the Dayabhaga. The following is a literal translation of that verse from the original.

"Therefore, a kinsman who is allied by a common oblation
 "as presenting funeral oblations called the *Troipurosik Pind*
 "in the family of the father, or in that of the mother of the

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 GURU GOBIND "or stock, though of different male descent, as his own daughter's
 SHAHA MAN- "son or his father's daughter's son, &c., or having sprung from a
 DAL "different stock, as his maternal uncle, &c., is heir; and the text
 ANAND LAL " (to three must libations, &c.) is intended to propound the succes-
 GHOSE "sion of such kinsmen, and the subsequent passage (to the
 MAZUMDAR "nearest *sapinda* the inheritance belongs) must be explained
 "as meant to discriminate them according to their degree of
 "proximity."

Now, it is beyond all question that the son of a paternal uncle's daughter is a *sapinda* of the same description as the son of the father's daughter; and if it is once conceded, as it must be, that the word "&c." used after the words "maternal uncle's" is comprehensive enough to include every relative who is competent, like the maternal uncle, to offer funeral oblations to the maternal ancestors of the deceased proprietor, we do not see any reason whatever why the same word "&c.," which is also used after the words "father's daughter's son," should not be considered as comprehensive enough to include every relative who is competent, like the father's daughter's son, to offer such oblations to his paternal ancestors. It is perfectly clear that both the texts of Menu, relied upon in this verse, are as general in their character as possible, for the name of a single heir is not mentioned in either of them. Why then are we to suppose that the author of the *Dayabhaga* intended to limit the operations of those texts in the case of those *sapindas* who are competent to offer funeral oblations to the paternal ancestors of the deceased proprietor, at the very time when he was extending that operation to every *sapinda* who is competent to offer such oblations to his maternal ancestors only? Surely, if this had been the real object of the author of the *Dayabhaga*, in open defiance of his own construction of Menu, who is universally regarded as the highest authority on all questions of Hindu law, he would have not only expressed it in a language which could not possibly be mistaken, but he would have also assigned some reason, good, bad, or indifferent, to justify such gross departure from the very principle which he has so often declared to be the fundamental basis

of all his speculations. On the contrary, let us consider for one moment what he has himself stated in verse 30, Section 6, Chapter XI. This verse, which contains the final *resumé* of all his discussions on the subject of inheritance, as is clear from the very position which it occupies in the Dayabhaga runs as follows :—

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“In like manner the appropriation of the wealth of the deceased proprietor to his benefit in the mode which has been stated should, in every case, be deduced according to the specified order.”

Here then is a positive injunction to determine every case relating to the law of inheritance according to the doctrine of spiritual benefit: and it is distinctly stated in the very next verse that this doctrine has the fullest sanction of “Menu and other sages,” from whom the whole Hindu law is derived. The word “deduced” used in the passage above quoted demands particular attention. If the author of the Dayabhaga had supposed that all the details connected with the law of succession had been finally settled by himself, no necessity for any kind of deduction whatever could have possibly existed. On such an hypothesis all that he would have required us to do would have been merely to follow those details according to his own directions in each particular case. It has been said that the words “according to the specified order” would rather go to support such an hypothesis; but it is clear that the specification referred to in this place is no other than that contained in the preceding verse, which merely says that the order of succession is regulated by the degree of benefit.

Lastly, it has been urged that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit would interfere with that which has been assigned, by the author of the Dayabhaga, to some of the heirs specified in the earlier part of Chapter XI. Whether this is really the case or not, we need not pause to enquire, for what we have to determine in the present case is not the precise position which the son of a paternal uncle's daughter is entitled to occupy in the category of heirs, but whether he is entitled to inherit at all. If the author of the Dayabhaga has

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in fact given to any particular heir or heirs a position which, if not strictly consistent with the principle which he has himself laid down for our guidance, the utmost that can be said is that that particular heir or heirs should be allowed to retain that position. But the circumstance, even if true, cannot be accepted as a sufficient reason to justify the total exclusion of one single individual who is really competent to satisfy all the requirements of that principle. If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise whether the details of a work like the Dayabhaga ought to be permitted to override the principle upon which it is admittedly based. We have already shown that, according to the author's own interpretation of Menu, the nearest heir is he who is competent to confer the greatest amount of spiritual benefit on the deceased proprietor. But if, in any case we are bound to depart from that interpretation, merely because he himself has done so, we do not see any reason whatever why he should add to the inconsistency by pushing it further than the requirements of that particular case. "Decision must not be made," says Vrihaspati, "solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law, there might be a failure of justice." That this rule of construction is perfectly consistent with the dictates of good sense and natural justice is beyond all question; and that we can safely accept it for our guide in the present case, is evident from the fact that the authority of its framer is repeatedly acknowledged in the Dayabhaga itself, to be one of the very highest on all questions relating to the Hindu law of succession.

For the foregoing reasons, we are of opinion that the son of a paternal uncle's daughter is entitled to be recognized as an heir according to the Hindu law current in the Bengal school.

PEACOCK, C. J.—I concur in the above judgment, and I would add that the above view is borne out by the Dayakrama Sangraha, Chapter I, Section 10, verse 9, where it is said:—"In default of the paternal grandfather's daughter's son, the uncle's

"daughter's son succeeds, because he presents two oblations, in
 "which the deceased owner participates, namely, to the owner's
 "paternal grandfather and great-grandfather (i. e., his own mater-
 "nal great-grandfather and great-great-grandfather.)"

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KEMP, J.—I concur in the judgment.

MACPHERSON, J.—I concur.

HOBHOUSE, J.—I adhere to my original judgment given on the reference, and I concur in this judgment as practically in accordance with my own.

[APPELLATE CIVIL.]

*Before Mr. Justice Norman, Officiating Chief Justice, Mr. Justice Bayley,
 and Justice Sir G. P. Hobhouse Bart.*

HARRAK SING AND ANOTHER (DEFENDANTS) v. TULSI RAM SAHU
 (PLAINTIFF).*

*Petition of Appeal under s. 15, Letters Patent—Time for presenting the
 Petition—Practice—Suit for Enhancement of Rent—Act X of 1859, s. 4—
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Per NORMAN and HOBHOUSE, JJ, (BAYLEY, J., dissenting), *held* that, in the present case, the defendant had not either in the written statement filed by him or in his statements in examination raised the question. Whether he was entitled to the benefit of Section 4 of Act X. of 1859.

See also.

(*Per* PEACOCK, C. J., and KEMP and MACPHERSON, JJ.—A petition of appeal, under section 15 of the Letters Patent, from a decision of an Appellate Division Bench may be presented within thirty days from the time when the written judgment of the Division Bench are put in. The difference of practice on the Original and Appellate Jurisdictions of the High Court contrasted).

THIS was a suit for enhancement of rent, on the ground of improvements caused to the land by irrigation, which had been made

* Appeal, No. 1 of 1870, under section 15 of the Letters Patent, against the decision of Mr. Justice L. S. Jackson, which prevailed on that of Mr. Justice Mitter, in Special Appeal, No. 1208 of 1868, dated the 26th November 1869, the said Judges being divided in opinion.

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at the plaintiff's expense. It was admitted by the defendants that the plaintiff had been at some expense in providing means of irrigation for the village by repairing an *ahur*; but their witnesses denied that their land had received any benefit from the irrigation.

The defendants also stated that their rent had been unchanged for more than twenty years, but not that they had a right to hold at fixed rates, on the ground of their rent having been unchanged since the time of the Permanent Settlement. No issue, therefore, was fixed on the point.

The defendants in their written statement said that "by a fixed hereditary holding (*gujasta maurasi*) from ancient times, more than 20 years, without change, or increase or decrease of rent, this land has been held."

In giving the evidence, one of them said,—“From the time of my father, this cultivation is *khilmi* ancestral. In 1263 (1856), the lands under cultivation were under my possession, and since my lands had been *khilmi jote*, from that time one *patta* or rate has prevailed.”

The plaintiff also claimed enhancement on the ground of increased area; but as this ground was not mentioned in the notice, his claim was disallowed.

The Assistant Collector gave plaintiff a decree for the amount stated in the notice, Rs. 151-8-3.

The Judge, on appeal by the defendants, modified the decree as being in excess of what it appeared proper to give under a report of a local enquiry previously ordered by him.

The defendants then appealed to the High Court, on the grounds:—

1. That when the Judge had found that the plaintiff was not entitled to enhanced rate, which he claimed in respect of all the lands, the suit should have been dismissed.
2. When the plaintiff could not prove that he was entitled to the rates claimed in the plaint, his suit in regard to such land should have been dismissed.
3. The Courts below should have fixed and tried an issue under section 4, Act X of 1859, which was distinctly and sufficiently pleaded.

4. It had not been found that the productive powers of the land had increased at all from former years ; the mere fact of repairing an *ahur* would not entitle plaintiffs to enhance, until it was found that the expense incurred by the zemindar resulted in the increase of the productive powers. A general allegation as to the increase was not sufficient.

The appeal was heard by L. S. Jackson and Mitter, JJ., who, on the 25th November 1868, delivered judgments as follows :—

JACKSON, J.—The Court is, unfortunately, divided in opinion in this case. I, therefore, state my own view, of course with some degree of diffidence, because I cannot but feel the utmost deference for the opinion of Mr. Justice Dwarkanath Mitter on such questions. At the same time I entertain no doubt upon the matter, and it is one which I have so frequently considered that I feel no hesitation in stating my opinion at once.

I do not at all depart from the view I expressed on the same question in the case of *Dhun Singh Roy v. Chunder Kant Mookerjee* (1). We (L. S. Jackson and Phear JJ.) there said :—“ It may be considered as fully settled that, where a ryot, in his answer to a suit for enhancement, pleads possession for a very long time, and expressly claims the benefit of the presumption under section 4, that is tantamount to his naming the Permanent Settlement ; and so of persons holding tenures under section 16.” That proposition appears to me still to be quite maintainable, in cases where the allegations of the defendant, and the proof given, make it clear that he relied upon a possession so ancient as to bring him within the terms of section 4, though he has not expressly referred it to the date of the Permanent Settlement. But where the defendant’s allegation, whether oral or written, suggests a commencement of the holding at a much later period, and his evidence is of the same character, then I do not think we can give any such effect to his defence, or that the presumption claimed will arise from the proof of twenty years’ occupation at a rent unchanged.

It is no doubt the duty of the Court to lay down the proper

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issues ; and if it appeared that in this case the issue of holding at unvaried rents from the time of the Permanent Settlement properly arose, it would be our duty to remand the case that such issue might be framed and tried ; but it seems to me quite impossible, from the tenor of the defendants' title and from their oral examination, to collect any such allegation as that theirs was a holding which had commenced previously to the Permanent Settlement, and had continued from that time to the present day at unchanged rates.

The defendants merely state that the land has come down to them from their father, by whom it was first brought into cultivation ; and I am bound to say that this statement is distinctly confirmed by the testimony of one of the plaintiff's witnesses. I look upon it, I confess, as a very serious matter to decide between landlord and tenant, not merely that the landlord is not entitled to the particular rent which he claims in the suit before the Court, but that the ryot is exempt from any enhancement of his rent for all time to come ; and I feel that nothing justifies the Court in carrying exemption one step beyond the limits which the law has provided. For these reasons I think that there is no valid ground of special appeal in the case before us ; and that as far as those grounds are concerned, the decision of the Court below ought to be affirmed. I think that, under the circumstances of this case, I should not say anything on the subjects of costs.

MITTER, J.—I am extremely sorry to differ from my learned colleague. The Deputy Collector was wrong, in my opinion, in refusing to lay down an issue upon the point as to whether or not the tenure held by the defendants was protected from enhancement by the provisions of section 3 of Act X of 1859. There are no such things as pleadings, technically so called, required by that Act ; and it is the duty of the Court itself to lay down all the issues essential to the right determination of the cause, the facts in dispute between the parties being previously ascertained by examining them or their duly authorized agents (1).

(1) See ss. 64 and 65, Act X of 1839.

In the present case, however, it appears that the defendants had put in a written statement, and the third paragraph of this written statement distinctly raises the plea that their tenure was not liable to enhancement under the provisions of the law. It is true that the paragraph in question does not contain a specific statement to the effect that the tenure has been held at a uniform rate from the time of the Permanent Settlement; but such a settlement is not absolutely necessary, as has been repeatedly held by this Court, in order to entitle a tenant to the benefit of section 3 of the Act. The said paragraph, however, distinctly states that the tenure is a *kadimi* or ancient tenure, and the provisions of section 4 and the various rulings of this Court upon that section are expressly set up as a bar to the enhancement sought for by the plaintiff. The words "long before twenty years" appear to have been used merely with reference to the provisions of section 4; and it would be in my opinion altogether inconsistent with the entire context to hold that, by using those words, the defendants intended to say that their tenure had come into existence at a time subsequent to the date of the Permanent Settlement. The Deputy Collector says:—"It is to be observed that "the witness Shabrat Ali states the land was first brought "under cultivation by the defendant's father," and he wishes to infer therefrom that the tenure in question could not have been in existence at the time of the Permanent Settlement. But it is to be observed, in the first place, that it is highly unjust to deprive a party of the opportunity of proving a particular point, and then to draw unfavorable inferences against him, with reference to that point, upon the isolated statement of one of the witnesses examined by him to prove the other points in the cause. Be this as it may, it is perfectly clear that the fact of the lands in dispute having been first brought under cultivation by the father of the defendants, is by no means inconsistent with the existence of the tenure at the time of the Permanent Settlement. No pains appear to have been taken by the Deputy Collector to ascertain either from the defendants or from their witnesses as to when it was that the lands were first brought under cultivation by the defendants' father; and it is impossible to say that the period during which the tenure has been held by the

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defendants, when added to the period during which it was held by their father, may not be equal to the period that had elapsed between the Permanent Settlement and the institution of this suit.

It has been said that the point now raised before us was not urged in the memorandum of appeal filed by the defendants in the lower Appellate Court, the ground taken therein being, that the defendants have succeeded in showing that their tenure had been held at a uniform rate for a period of twenty years next before the institution of the suit, and that the presumption arising from that fact in their favor had been no way rebutted by the plaintiff. This statement appears to be correct; but under the circumstances mentioned above, I think that there has been no fair trial of this case by either of the Courts below. The lower Appellate Court does not appear to have passed any opinion even upon the point that was distinctly raised by the defendants in their memorandum of appeal. The defendants, it appears, had put in their rent receipts for more than twenty years prior to the date of suit, and they had, in their examination before the Deputy Collector, distinctly sworn that they were the receipts of their tenure. It cannot be, therefore, said that the plea taken by them before the Judge was altogether unsupported by the record; and if the Judge had inquired into that plea, as he was bound to do, it is impossible to say what conclusion he would have arrived at with reference to it. Under these circumstances, I am of opinion that this case has not been properly tried, and that it ought to be, therefore, sent back to the Court of first instance to be tried, with reference to the foregoing remarks.

The judgment of Jackson, J., as that of the senior Judge, prevailed.

On the 11th February 1869, a petition of appeal, under section 15 of the Letters Patent, was filed by the defendant on the following grounds:—

First.—The Court has committed an error in holding that the defendants' allegation suggests a commencement of the holding at a much later period than the Permanent Settlement.

Second.—The Court should have held that the issue of hold-

- ing from the time of the Permanent Settlement properly arose in this case from the written statement of the defendants and from their oral examination.

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Third.—There is nothing in the defendants' statements to rebut, or destroy, or negative the presumption of a holding since the Permanent Settlement, and, therefore, the case should have been remanded.

Fourth.—It has not been found by the first Appellate Court that the productive powers of the land have increased at all from former years. The mere fact of repairing an "ahur" will not entitle the plaintiff to enhance, until it be proved and found that the expense incurred by the zemindar resulted in the increase of the productive powers, by proving actual increase.

On the same day the following order was passed thereon by

L. S. JACKSON and MARKBY, J.J.—No good cause has been made out for allowing this appeal long after the lapse of thirty days. The judgment of both the Judges composing the Division Bench was given in open Court, on the 25th of November. The party thereupon had his right of appeal, and was bound to present that appeal within thirty days from that date, unless he could show good cause to the contrary. The application must be refused.

A second petition of appeal was presented on the 3rd of April 1869, which was in the following terms:—

"That your petitioner was appellant in Special Appeal, No, 1209 of 1868, against one Tulsi Ram Sahu and others.

"That the case was heard by a Division Bench of this Hon'ble Court, on the 25th November 1868, consisting of Mr. Justice L. S. Jackson and Mr. Justice Mitter; and that there was a difference of opinion between the two learned Judges. The judgment was orally delivered.

"That the decision of Mr. Justice Mitter was in favor of your petitioner, and that of Mr. Justice Jackson against him.

"That the written decision of Mr. Justice Jackson was given in on the 25th January 1869.

"That your petitioner had filed his stamp paper for an attested

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copy of the judgments of the learned Judges, on the 7th December 1868, with a view to file an appeal to the Court at large and as Mr. Justice Mitter's decision was not given in, he received attested copies on the 1st February 1869. That, in the meantime, constant applications were made to the officers of the Court for the copy.

"That, on the 11th February, an appeal petition having been drawn out on full stamp was presented by your petitioner's pleader, Mr. C. Gregory, before Mr. Justice L. S. Jackson's Bench, because His Lordship was one of the Judges who decided the case, and the application was made to him for the admission of the appeal, under the impression that the word "Court," in the rules for admission of appeals to the Court at large, was taken to mean any Division Bench.

"That your petitioner submits that the word "Court" means the Court at large, of which the Hon'ble the Chief Justice is the President.

"That the decision given in on the 25th January 1869 should have been dated on that day, according to the rules laid down in Act VIII of 1859.

"That the order of Mr. Justice Jackson and Mr. Justice Markby is without jurisdiction, and ought not, therefore, to bind the Court of Appeal under section 15 of the Charter Act.

"That the Court, as distinguished from a Divisional Bench of the Court, has the power to admit your petitioner's appeal.

"That it is necessary, by the rules laid down, that the petition should contain the objections to the decision appealed against, stated and mentioned, and it was thought prudent to obtain a copy of the judgment before an appeal to the Full Court was presented in order that the objections may be well considered and stated.

"That the judgment of this Court, dated 25th November 1868, and the order of the 11th February, are herewith filed.

"Your petitioner, therefore, humbly prays that the said appeal put in by your petitioner, on the 11th February 1869, be considered as in time, or that an order be made for the admission of the said appeal, and your petitioner, as in duty bound, will ever pray."

On the above petition, the following order was passed on 3rd April 1869.

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PEACOCK, C. J.—As a Division Bench, we cannot interfere with the order of Mr. Justice S. Jackson and Mr. Justice Markby. According to my construction of the rule, the application ought to be made to the Appellate Court. The appellant is at liberty to apply to the Appellate Court when it sits. Let this motion be put on the list for the first day on which the Appellate Court sits, and let the pleader on the opposite side have notice.

The final order on the petition was as follows :—

PEACOCK, C. J. (concurrent in by KEMP and MACHPERSON, JJ.)—We think that the appeal ought to be admitted. Referring to the 1st section of the rules of the 5th August 1867, regarding the admission of appeals, under section 15 of the Letters Patent, to which Mr Gregory has referred, we think that the words “unless the Court in its discretion, on good cause shown, shall grant further time,” refer to the High Court, and not to the Division Bench. That being so, the High Court, for the hearing of an appeal of this nature, must consist of a Bench of at least three Judges. That is analogous with the practice laid down in section 333, Act VIII of 1859, in which it is enacted that “appeals shall be made in the form of a memorandum, which shall be presented in the Appellate Court, within the period hereinafter specified, unless the appellant shall show sufficient cause to the satisfaction of the Appellate Court, for not having presented it within such limited period.”

Upon the refusal of the Registrar to admit the appeal, on the ground of its having been presented beyond time, an application might have been made to the Chief Justice for the appointment of a Division Bench, for the purpose of hearing it, as provided by section 7 of the Rules of August 1867.

The case now comes before the Appellate Court, and it appears to me that the Court in its discretion ought to allow the appeal to be filed. On the Original Side of this Court, it

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has been held that delay in obtaining office copies of the judgment in a case is no ground for postponing the filing of the memorandum of appeal, as the counsel should note the judgment on the brief. On that side of the Court, Judges do not always put in a written judgment; but on this side of the Court, where the first hearing is upon appeal, a written judgment is always put in, in order that it may be transmitted to the Court from which the appeal comes. That being the practice on this side of the Court, it appears to me that, if an appeal is presented within thirty days from the time at which a written judgment is put in, the applicant has a reasonable ground for applying to this Court in its discretion to admit it, even though filed after thirty days from the time when the judgment was delivered orally in Court. The appeal is admitted.

On a subsequent day, the appeal was heard by Norman, Bayley, and Hobhouse, JJ.

Mr. G. Gregory, for the appellants, contended that the issue whether or not the defendants were entitled to claim the protection of Act X of 1859, section 4, was sufficiently raised by the defendants in their written statement and their evidence. He referred to *Bhoyrubnauth Sandyal v. Mutty Mundle* (1), *Jugmohun Dass v. Poornoo Chunder Roy* (2), *Nyamut-collah v. Gobind Chunder Dutt* (3), *Gooroo Doss Mundle v. Sheikh Durbaree* (4), *Dhun Singh Roy v. Chunder Kant Mookerjee* (5), *Poolin Beharee Sein v. Nemaye Chand* (6), and *Koonwur Raj Coomar Roy v. Assa Beebee* (7).

Baboo Ramesh Chandra Mitter, *contra*.—The defendants had not raised the plea that they were protected under section 4, Act X of 1859, with sufficient distinctness.

NORMAN, J.—The question before us is whether the Deputy Collector was wrong in not fixing an issue upon the question whether the tenure held by the defendants is protected

(1) W. R., 1864, Act X Rul., 100

(2) 3 W. R., Act X Rul., 133

(3) 4 W. R., Act X Rul., 25.

(4) 5 W. R., Act X Rul., 86.

(5) 4 W. R., Act X Rul., 43.

(6) 7 W. R. 472.

(7) 3 W. R., Act X Rul., 170.

from enhancement by the provisions of section 3, Act X of 1859. That is the way in which the question is stated by Mr. Justice Mitter ; and in my opinion it is perfectly and correctly stated.

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The right which, in a case like this, a ryot puts forward, is created by the 3rd section of the Act. That section gives to ryots who hold lands at rates of rent which have not been changed from the time of the Permanent Settlement the right to receive pattas ; or, in other words, to continue to hold at those rates. The issue then in a case like this is " whether the ryot has held at rates which have not been changed since the " Permanent Settlement." The affirmative of that issue rests on the party who asserts that he possesses that right. In my opinion the Court is not bound in any case to raise or try an issue upon the existence of a right, unless the party asserts the existence of such right, and claims to have the title tried.

Many cases have been cited by Mr. Gregory in the course of the argument. In considering the effect of these cases, it is necessary to observe that, in proceedings under Act X of 1859, the issue is raised on the statements of the parties on oath. It is impossible for anybody to speak from his own personal knowledge and observation as to the state of things which existed at the time of the Permanent Settlement. If therefore, the party setting up a right to hold at fixed rates from the time of the Permanent Settlement alleges facts which show that he means to assert that, according to the best of his knowledge and belief, his rate of rent has not been changed from the Permanent Settlement, or from a time which he may reasonably believe was as remote as the permanent Settlement, such an allegation is sufficient. The statement is made with as much certainty and positiveness as, looking at the subject with reference to which it is made, and the restrictions under which the claimant is placed, the circumstances admit of. Thus, if a man who produced receipts extending over forty or forty-five years alleged that he and his ancestors had held at an unchanged rate for a very long time, and there was no inference that the assertion was not meant to imply that they held from a time as early as the Permanent Settlement, the

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Court have treated that as an assertion that he and his ancestors had held at rates which had not been changed since the Permanent Settlement. That assertion was probably made as positively as it was in the power of the ryot to make it. I believe that not one of the cases cited is not capable of that explanation. But the present case is totally different. It is important to see what the claim here is. It is a claim to enhance the rent of the defendants' tenure, upon the ground that the plaintiff has provided means of irrigation of the land by which the productive powers of the land have increased. How is that claim met? It is met by a denial that the productive powers have increased. The defendant makes a further answer in a written statement put in before his examination; he says that, "by a fixed hereditary holding (the words used are *gujasta maurasi*) from ancient times, more than twenty years, without change or increase or decrease of rent, this land has been held." That is the written statement. He does not say as far as he or his father remembered, but "from ancient times more than twenty years;" and he does that, in order to throw the burden of proof on the plaintiff. That statement was put in on the 4th of November.

On the following day, he was examined under section 59, and the issue was fixed as provided by section 65; the defendant on that occasion did not pretend to say that his predecessors had held at fixed rates from the time of the Permanent Settlement. Nothing of the kind appears to have been alluded to either by himself or his pleader. There is not one word on that point till his cross-examination by the plaintiff's pleader. In answer to that he says:—"from the time of my father, the cultivation is *khilmi* (reclaimed) ancestral. From the year 1262 (1865) the lands have been in my possession, and I hold receipts for the payment of rent. Since my jote has been *khilmi* jote, the lands have been held at one single rate." When were his lands reclaimed? What was the time of his father since which the cultivation was *khilmi*? That was a fact entirely within his own knowledge, and yet no statement was then made which could lead to the inference that the land had been reclaimed, and that his father held the land as reclaimed from the time of the Permanent Settlement. The case then goes to trial, without

objection on the part of the defendant, on the single issue whether the productive powers of the land had been increased.

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The defendant endeavoured to show that his lands were less productive than formerly. What is the evidence as to that? Shabrat, his own witness, in his examination-in-chief, says that, when the cultivation was new in the time of the defendant's father, the production was five or seven maunds per biga, and now it is less. There is no doubt in my mind that the fact that the reclamation of the land by the defendant's father took place in recent time was within the knowledge of the parties present when the issues were fixed, and that no one pretended to say that the reclamation was as ancient as the Permanent Settlement.¹

I think that the rule ought to be steadily adhered to, that, if a party does not assert a title in himself, the Courts ought not to be astute in picking out a title for him. It is a well-settled rule of law that a man cannot plead evidence, and section 4 merely relates to evidence. It merely declares that, "when in any suit under this Act it shall be proved that the rent at which land is held by a ryot has not been changed for twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the Permanent Settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period."

A man is not at liberty to say "I have some evidence" (evidence which is rebuttable) "that the land was held at fixed rates from the time of the Permanent Settlement."

Suppose a suit was brought on a bond, and the defendant, instead of saying that he had paid the amount secured by the bond, which would be a matter the truth of which would be within his own knowledge, were to say, "I produce this paper," purporting to be a receipt; "the plaintiff's name is signed on it." That would not be equivalent to saying he had paid the money; it would be no answer to the suit. The defendant would be asking the Court to draw an inference as to a fact, the existence of which he did not venture to assert. I think that the Deputy Collector came to a right conclusion, when he said that "the defendants have not pleaded a right to hold at fixed rates on the ground of the rent having been unchanged since the Permanent

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"Settlement, but only that their rent has been unchanged for more than twenty years; and that he was right in not trying the truth of an allegation which the defendants did not assert.

Under these circumstances I think that the decision of Mr. Justice Jackson, the senior Judge, is the correct one, and that it must be affirmed with costs.

HOBHOUSE, J.—The plaintiff in the Court of first instance sued the defendants, who are the special appellants before us, for arrears of rent upon their tenure for the year 1274 (1867).

The defendants put in a written statement, and one of them gave his deposition on oath, in answer to the averment of the plaintiff, and the Court of first instance gave the plaintiff a decree for a certain amount of rent, and declined in the following words to entertain the particular issue, in the matter of which there is now a contention before us. The Court remarks:—"As the defendant have not pleaded a right to hold at fixed rates, on the ground of the rent having been unchanged since the date of the Permanent Settlement, but only that their rent has been unchanged for more than twenty years, no issue has been fixed on this point. It is to be observed that their witness Shabrat Ali states that the land was first brought under cultivation by defendants' father." The Court in these terms declined to go into the question as to whether the lands were held at rates which had remained unchanged from the time of the Permanent Settlement.

The case then came, after having passed through the lower Appellate Court, before a Division Bench of this Court, in special appeal, and the senior Judge in that Division Bench having differed from the junior Judge upon the question as to whether any issue arose such as the first Court refused to entertain, his judgment became the judgment of the Court, and is now under section 15 of the Charter in appeal before us.

Mr. Justice Mitter has considered that the question of unchanged rate, from the time of the Permanent Settlement, was raised upon the pleadings, and that the first Court was bound, therefore, to try and determine that question; and the learned Judge would, therefore, have remanded the case for trial of that

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issue. Mr. Justice Jackson, on the other hand, considered that the issue did not properly arise, and the material part of his judgment may, I think, be found in the following words :—

“ It is no doubt,” the learned Judge remarks, “ the duty of the Court to lay down the proper issues ; and if it appeared that in this case the issue of holding at unvaried rents from the time of the Permanent Settlement, properly arose, it would be our duty to remand the case that such issue might be framed and tried ; but it seems to me quite impossible, from the tenor of the defendants’ title, and from their oral examination, to collect any such allegations as that theirs was a holding which had commenced previously to the Permanent Settlement, and had continued from that time to the present day at unchanged rates.” In these words, the learned Judge seems to me to have considered that the issue did not properly arise, because it could not be collected from the tenor of the defendants’ title, and from their oral examination ; and he goes on further to say that it could not be collected from certain evidence given on the part of the defendants to which he refers. The words on which Mr. Gregory for the appellant relies as raising the issue in question, are thus stated in the written statement of the defendants. The defendants there state that the tenure is not liable to enhancement by reason of its being “ a *gujasta maurasi* tenure from ancient times, for more than twenty years, without change, or increase or decrease of the rate at which this tenure has been held ; that the cultivation (*jote*) was ancestral, and has remained, according to old custom, at one rate ; and by reason of the tenure being *gujasta maurasi* the rent is not enhanceable ; and the prayer to enhance is opposed to the provisions of section 4, Act X of 1859.” This, in my opinion, is, on the very face of it, a statement somewhat vague in terms ; but still in making that statement, the defendants do point to the provisions of section 4, Act X of 1859, the terms of which section will be seen to comprehend a tenure which was in existence at the time of the Permanent Settlement ; and if this statement had stood alone, and was all that we had to consider in this case, I should have been inclined to say that, having reference to the

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various precedents, *Bhojrubnauth Sandyal v. Mutty Mundle* (1). *Jugmohan Dass v. Poornoo Chunder Roy* (2), *Nyamutoollah v. Gobind Chunder Dutt* (3), *Dhun Singh Roy v. Chunder Kant Mookerjee* (4), *Gooroo Dass Mundle v. Sheikh Durbaree* (5), *Poolin Beharee Sein v. Nemaye Chand* (6), and *Koonwar Raj Goomar Roy v. Assa Beebee* (7), on which Mr. Gregory has relied, there was some indication that the defendants had at one time intended to plead that they held a tenure of the nature contemplated by section 4. But whatever the defendant may have intended to plead when they first filed their written statement, I think it is quite clear, from the subsequent proceedings, that they abandoned, if ever they seriously attempted to put forth, any such case as that the tenure existed and was held at one rate of rent from the time of the Permanent Settlement. I observe that the written statement was put in on the 4th November. On the 5th November, the defendant was examined, and I understand that in his examination-in-chief he confined himself merely to the statement that the lands had not been improved by the irrigation works put up by the plaintiff, and that no measurement of the lands had been made in his presence; and it was not until he was subjected to cross-examination that he made anything like even an allusion to the existence of his tenure at the time of the Permanent Settlement, and then what he said on that occasion was something very far short of what he had only the day before stated in his written paper. The words he used were these:—"From the time of my father, this cultivation is *khilmi*, "ancestral. In 1263 (1856) the lands under cultivation were "under my possession, and I hold receipts for payment of the "rents; and since my lands had been *Khilmi* jote, from that time "one patta or rate has prevailed." This seems to me to be a considerable departure, and resiling from the statement he made the day before on paper. Then it seems to me, as pointed out by the pleader for the respondent, that, in accordance with the provisions of section 65 of Act X of 1859, it is at any rate prin-

(1) W. R. 1864, Act X Rul., 100.

(5) 5 W. R., Act X Rul., 86.

(2) 3 W. R., Act X Rul., 133.

(6) 7 W. R., 472.

(3) 4 W. R., Act X Rul., 25.

(7) 3 W. R., Act X Rul., 170.

(4) 4 W. R., Act X Rul., 43.

cipally from the examination of parties that the issue which have to be decided under Act X are to be framed. I do not think that it can be said, as the pleader would have contended, that the written statement should not be taken into consideration at all, because, by the provisions of section 59 such a statement is receivable in evidence; and it would be absurd to suppose that the Legislature, while it provided that such written statements might be placed on the record, could have intended that such statements should not, when on the record, be taken into consideration. However, I think, with reference to the provisions of section 65, that it was intended that the Revenue Courts in framing issues should more particularly look to the examination of the parties themselves. The issues in this case framed after the examination of the parties, *i. e.*, of the defendants, on the 5th November 1867, was this:—Have the productive powers of the lands been increased by the *ahur*, which the plaintiff set up; and if so, to what extent. This was the issue which, after the examination of the parties, and in their presence, the Revenue Court laid down and to this issue the evidence on both sides was directed: and beyond the vague statement to which I have referred, as having been given by the defendant in his examination, there is nothing that has been shown to me which points to the trial of any issue other than that which has been already referred to. Neither is there anything on the record, in the way of protest, on the part of the defendants against this issue, nor in the way of a request from them that any other issue, in addition to that stated, should be entertained and determined by the Court. The case upon the record was closed on the 27th November, and on the 28th November the Court gave judgment upon it. Then on that day, for the first time, there seems to have been something like a suggestion that the Court ought to have tried an issue as regards the existence of the tenure of the Permanent Settlement. This appears in the shape of a petition on the part of the defendant by his mooktear, and not verified; the material part of which is couched in these terms:—“Though my *gujasta* cultivation “is from the time of the Permanent Settlement, and documentary “evidence has been put in of twenty-nine years, yet by reason

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"of its being entered in the written statement 'more than twenty years,' and not the words 'Permanent Settlement,' consideration "or issue in respect of the *gujasta* has not been fixed. The "fact is that, when the number of years is not specified, then "when I said 'more than twenty years.' that is equivalent to "having said 100 years, and the Permanent Settlement is in 1202 " (1795)." Therefore, the petitioner concludes, by praying that the Judge do conduct, or cause to be conducted, a local investigation, and we may presume that it was a local investigation, amongst other matters, of the question of the existence of this tenure at the time of the Permanent Settlement. Upon this petition, the Judge remarked that the case was closed; that he was about to give his decision, and therefore he rejected the prayer in the petition; and thereafter in his judgment, the Judge gives that decision in the matter of this particular issue which I have before quoted. It seems to me, upon this state of the evidence as it appears upon the record, that, if we may say that there was in the first instance something in the written statement of the defendant upon which the issue before us might have been founded. I think we cannot but say, upon examining his own disposition and those of his witnesses, and upon looking to the conduct of the case on his part in the first Court, that he never did really intend to raise, and did not attempt to raise until he had been defeated upon the real point, an issue upon the question of the existence of the tenure at the time of the Permanent Settlement; and I am confirmed in this opinion by observing that, when the defendants appealed to the lower Appellate Court, they did not say that an issue had not been framed and tried which ought to have been framed and tried, and did not demand a retrial on such new issue; but they said that, upon the evidence on the record; this particular fact, in the matter of which they now come before us, had been established. It results from what I have said that I agree with the learned Judge whose decision has prevailed in this case, that the issue did not properly arise, though I do not agree altogether with every reason on which the learned Judge has supported his decision; and though Mr. Gregory for the special appellant contends that it is not in this way that we are entitled to deal with

the judgment now before us, yet I apprehend that the point before us, on which the learned Judges differed, is, whether, upon the evidence on the record, the Judge of the first Court was right or wrong, whatever his reasons were, when he decided that this issue did not arise, and could not be decided by him ; and I think that, upon this point, the learned senior Judge is right when he says that the issue did not arise. I would, therefore affirm his judgment, and dismiss this appeal with costs.

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BAYLEY, J.—I regret very much to say that I differ from my learned colleagues in the view that I take of this case. I think that the judgment of Mr. Justice Mitter is right, and ought to be affirmed. At this late hour I will not enter into all the details and particulars that we have heard in the course of the argument, but will confine myself to two leading facts in the case which I consider material.

The plaintiff sued to enhance the rent of the defendants by reason of the greater productiveness of the soil, in consequence of certain irrigation works alleged to have been provided by the plaintiff.

The defendants denied that the productiveness in the soil had increased, and made the following written statement in answer to the plaintiff's claim in words which, for exact reference, I read from the Court's paper-book :—" The rate has continued " from long before twenty years, without alteration or change, at " old hereditary rate." Defendants then go on to state in the same written statement : " The former proprietors did not, by " reason of the old hereditary tenure, enhance the rent. Under " such circumstances, plaintiff's suit for enhancement of rent " on the basis of the notice is inadmissible, under section 4, " Act X of 1859, and various precedents."

After this written statement was put in, one of the defendants was examined. There the examination-in-chief refers only to the question of the productiveness of the soil. The Court asks the defendant no question as to whether defendant pleaded that his tenure was protected by reason of its existence from the time of the Permanent Settlement or not, but the plaintiff's vakeel asks him some questions to which the defendant answers

1870 in the terms given by Mr. Justice Hobhouse. He does not
 HARRAK SING there specifically mention either section 4, or that he held
 v. from the time of the Permanent Settlement, or from more than
 TULSI RAM twenty years. He merely says that the lands are *khilmi* (reclaimed)
 SAHU. lands of a hereditary nature, *maurasi*, and from his father's time.

Upon these statements of the defendants, the Deputy Collector was of opinion that the plea of exemption from enhancement, under the provisions of sections 3 and 4, Act X of 1859, was not intended to be taken by the defendants, and therefore no issue was necessary to be fixed upon this point. I may as well here refer to a petition, dated the 27th November 1867, put in by the defendants, in which they very clearly stated that, by the use of words like "all along, more than twenty years," they meant to have the benefit of the presumption of section 4, and that the use of the words "more than twenty years" was equivalent to naming 100 years, and the Permanent Settlement was within 73 years, in 1202 (1795). It is true that this petition seems to have been put in, after the evidence had been taken, and when the Deputy Collector was about to pronounce his judgment; But yet I take it as an index to the nature and character of a plea of exemption under sections 3 and 4, which the defendants really all along intended to set up against the plaintiff's claim. Under the provisions of Act X, it is not absolutely necessary for a party to plead precisely in the very words of the sections, and it was for some time a question of doubt, whether to entitle a ryot to the benefit of section 4, it was necessary for him, expressly to refer the Permanent Settlement; but the whole current of decisions of our Court has now settled the point that it is not necessary for a ryot expressly to use the very words, if he pleads substantially that he has held at one rate from the period of the Permanent Settlement; and if he proves twenty years' holding at any uniform rate, that will suffice to raise the presumption that he held at one rate from the time of the Permanent Settlement; and it will be then for the other party to rebut the presumption by showing that the rent had varied at some period subsequent to the Permanent Settlement. Now section 59 of the Act seems to contemplate that the real facts are to be elicited by the Court from the exami-

nation of the parties, and also from the plaint and written statements. In the present case, however, it is clear that there was no examination of the defendant by the Court on the point as to whether the nature of his tenure was such as to bar the plaintiff's suit for enhancement, with reference to sections 3 and 4 of Act X of 1859. Now, from the words in the written statement of the defendants above cited by me, and also from their petition of the 27th November referred to above, it seems to me sufficiently clear that the defendants gave the Court to understand that their tenure had existence from a very long date, and invited an issue on the question, whether it was liable to enhancement, under the provisions of sections 3 and 4. It is, however, contended that, when the Deputy Collector declined to raise an issue upon this question, this point was not made a subject of appeal before the lower Appellate Court. But I think that such a point was taken, though not very clearly, in the words where the defendants said that the lower Court was wrong in not allowing them the exemption they sought under the provisions of section 4. Again, in the third ground of special appeal to this Court, we distinctly find that there was an objection by the defendants that the very issue should have been distinctly raised and tried. It is clear from the judgment of the Deputy Collector that he did not raise and try the issue, simply because the defendants said that they held at one rate for more than twenty years, instead of saying that they held from the time of the Permanent Settlement, which statement alone, it seems in his opinion would have entitled the defendants to the benefit of section 4. The Deputy Collector says :—" As the " defendants have not pleaded a right to hold, at fixed rents, on " the ground of the rent having been unchanged since the date " of the Permanent Settlement, but only that their rent has been " unchanged for more than twenty years, no issue has been " fixed on this point." As pointed out above, this view is clearly opposed to the whole current of decisions of this Court, which have invariably held that the naming of the Permanent Settlement is not absolutely necessary.

For these reasons I think the defendants in their written statement, and in the petition of 27th November, and in the

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1870 whole tenor of their answer, gave sufficient means to the Court
 HARRAK SING to raise the issue as to whether their tenure was protected
 v. under the provisions of sections 3 and 4, Act X of 1859.
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I concur, therefore, with Mr. Justice Mitter in holding that the Deputy Collector was wrong in not having raised and tried an issue upon that point.

I would, accordingly, reverse the judgment of the senior Judge, Mr. Justice Jackson, and remand the case to the first Court for determination of the issue above noticed.

Before Mr. Justice L. S. Jackson and Mr. Justice Phear.

GOLAM ASGAR (PLAINTIFF) v. LAKHIMANI DEBI

AND OTHERS (DEFENDANTS).*

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 March, 9.

Execution of Decree—Limitation—Purchase of Decree in Execution—Act XIV of 1859, s. 20.

See also G. A. obtained a decree against M. Afterwards L. N., who had obtained a decree
 11 B. L. R. 43. against G. A., attached the decree which he (G. A.) had obtained against M., and, upon sale in execution, became himself the purchaser of that decree. [It afterwards appeared that the decree held by L. N. against G. A. was barred by limitation.

Held, that the execution of L. N.'s decree against G. A. being barred by lapse of time at the time of sale, the sale was invalid.

THE following case was referred, for the opinion of the High Court, by the Judge of the Small Cause Court of Raraghat:

“The plaintiff had got a decree against Ramdhan Maddak, and afterwards the defendants, in execution of a decree, which they held against plaintiff, put up for sale, and themselves purchased, the plaintiff's decree against Maddak. Meantime, a litigation was going on between the plaintiff and the defendants, in reference to the decree, which the latter held against the former, and which was finally held to be barred by limitation; but before this consummation was arrived at, defendants had sold, and themselves bought in, plaintiff's decree against Maddak. The plaintiff now sues them for the amount of that decree with interest. The defendants, admitting all the facts stated above, plead that, when their decree against the plaintiff, in execution of which the plaintiff's

* Reference, No. 3 of 1870, from the Judge of the Small Cause Court of Raraghat, dated the 31st January 1870.

decree against Maddak was sold, and bought in by them (defendants) was declared barred by limitation, everything done in execution of it became *ipso facto* void, among the rest the sale and purchase by them (defendants) of the decree against Maddak, and that the plaintiff has reverted to his original position, as decree-holder, and can execute the decree against Maddak, no part of which has been satisfied by the latter, and which is still in full force, and that the defendants have no objection to his doing so; so that, in fact, the plaintiff has suffered no injury at all. The first question is whether the invalidation of the defendants' decree *ipso facto* voids the sale, in execution of it, of the plaintiffs decree against Maddak, and remits the plaintiff to his original position as holder of that decree. If so, he has of course no right of action in this Court, because his decree against Maddak being still unexecuted, and not barred by limitation, he will be in as good a position with regard to it as ever and will have suffered no loss by the defendants' proceedings. But, if notwithstanding the judgment on limitation, the sale remains valid, he will have been deprived of all benefit from his decree.

"The second question is, supposing that the sale of the decree against Maddak remains valid, notwithstanding that the decree, in course of which that sale took place, was subsequently set aside, is plaintiffs proper remedy a suit in this Court, or is he barred by section 11, Act XXIII of 1861?"

As bearing upon the first question, the Judge referred to *Chunder Kant Surmah Talookdar v. Bissessur Surmah Chuckerbutty* (1), *Jan Ali v. Jan Ali Chowdhry* (2), *Nursing Churn Sein v. Bidyadhuree Dossee* (3), *Jodoo Nath Gossain v. Nobokishen Chatteree* (4).

The following were the judgments of the High Court :

JACKSON, J.—In this case the first of the two questions raised by the Officiating Judge of the Small Cause Court at Ranaghat is the only one which it seems necessary to answer. That question is, whether the invalidation of the defendants'

(1) 7 W. R., 312.

(3) 2 W. R., 275.

(2) 1 B. L. R., A. C., 56.

(4) 4 W. R., 66.

1870 decree voids the sale made in execution of it of the plaintiff's
 GOLAM ASGAR decree against Maddak.

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The circumstances were that the plaintiff, Golam Asgar, had got a decree against Maddak, and afterwards the defendants, Lakhi Narayan and others, who held another decree against the plaintiff, Golam Asgar, sold, and became themselves the purchasers of the first mentioned decree against Maddak. It afterwards turned out that the decree which Lakhi Narayan and others held against Golam Asgar was barred by limitation. The question, therefore, is, whether the circumstance that the execution of the decree, under which that sale took place, was barred by lapse of time, invalidated all that took place in that execution. It seems to me quite clear that it did. In the cases referred to by the Judge of the Small Cause Court, the facts were otherwise. In those cases, the sale took place under a decree which at the time of the sale was in force and valid ; and, consequently, the Court in selling the property acted with jurisdiction, and the circumstance that the decree was afterwards reversed on appeal, or upon a review of judgment, would not vitiate what was done under the decree before reversal, or divest the Court of its jurisdiction to do that which it did. In the present case, it appears that, at the time of the sale, the execution of the decree under which the sale took place had been barred by limitation. The Court was, therefore, incompetent to execute that decree, or to do anything under it. The sale, therefore, naturally, like every thing else done in that stage of the proceedings, and after the bar of limitation had occurred, fell to the ground. Under these circumstances the plaintiff, it is clear, is not in any way injured by what took place, and has no cause of action against the defendant.

PHEAR, J.—It has before occurred to me to draw a distinction between the case of a sale effected in execution of a decree which was valid at the time of the sale, and a sale in execution of a decree which is afterwards pronounced by a competent Court to have been an invalid decree at the time of that sale. I concur in the judgment pronounced by Mr. Justice Jackson.

[ORIGINAL CIVIL].

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.

KELLY *v.* KELLY AND SAUNDERS

1870-
Jan. 4th

Co-respondent's Right to be heard in Appeal—Adultery—Alimony—Divorce Act (IV of 1869), s. 37—Access to Children—Costs.

A husband brought a suit for divorce against his wife on the ground of her adultery; the co-respondent appeared in that suit. The respondent appealed on the ground (*inter alia*) that, on the evidence, the Court ought to have held that the adultery was not proved. *Held*, that in that appeal the co-respondent was not entitled to be heard in opposition to the appeal.

The Court has power, under section 37 of Act IV of 1869, to order permanent alimony to the wife, when a husband obtains a divorce on the ground of her adultery. When the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage.

THIS was an appeal from a decision of Mr. Justice Phear in a suit under the Indian Divorce Act, IV of 1869. The suit was brought by the husband for a divorce, on the ground of his wife's adultery, and the petitioner had, by order of the Court, deposited in Court a sum to cover the expenses of the wife's costs and alimony *pendente lite*. Mr. Justice Phear, on the evidence before him, gave a decree *nisi* for a divorce, and decreed damages against the co-respondent (1). From this decree the respondent appealed, principally on the ground that the evidence did not show that adultery had been committed.

Mr. Creagh and Mr. Hyde were heard for the appellant.

Mr. Marindin and Mr. Cowell for the respondent were not called on.

Mr. Piffard applied to be heard on behalf of the co-respondent.

PEACOCK, C. J.—I think it clear that the co-respondent has no right to be heard in this appeal in opposition to the appeal of

(1) 3 B. L. R., O. C., 67.

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Mrs. Kelly. The appeal is on the ground, first, that, upon the evidence, the learned Judge ought to have found that the adultery was not proved. If the co-respondent can appear and oppose on that ground, and say that the Judge was right in finding that adultery was committed, it would be contrary to the prayer contained in his written statement, in which he prayed that the Judge would reject the prayer of the petitioner. The same reasoning applies to the other two grounds of the appeal. It is said by Mr. Piffard, that possibly Mr. Saunders may have an interest in setting aside the decree, on the ground that if the divorce is granted, Mr. Saunders will be obliged to marry Mrs. Kelly ; but I know of no legal obligation on the part of the co-respondent to marry her, and under these circumstances it appears to me that there is no ground for hearing the co-respondent.

It appears to me that there are no grounds for reversing the decision of Mr. Justice Phear, upon the question of fact as to whether adultery was committed by Mr. Saunders and Mrs. Kelly, or upon the ground that that adultery was condoned.

The rules upon which the Courts act in cases of this kind were very clearly laid down by Lord Stowell in the case of *Loveden v. Loveden* (1). He there said : " It is not necessary
" for me to state much at large the rules of evidence which
" this Court holds upon subjects of this nature, or the principles
" upon which those rules are constructed : they are principles
" so consonant to reason, and to the exigencies of justice, and
" so often called for by the cases which occur in these Courts,
" that it is on all accounts sufficient to advert to them briefly. It
" is a fundamental rule that it is not necessary to prove the
" direct fact of adultery ; because, if it were otherwise, there is
" not one case in a hundred in which that proof would be attain-
" able : it is very rarely indeed that the parties are surprised in
" the direct fact of adultery. In every case almost, the fact is
" inferred from circumstances that lead to it by fair inference as
" a necessary conclusion ; and unless this were the case, and
" unless this were so held, no protection whatever could be given
" to marital rights. What are the circumstances which lead to such

(1) 2 Hagg. Con. Rep., 2.

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"a conclusion cannot be laid down universally, though many of
 "them, of a more obvious nature, and of more frequent occurrence,
 "are to be found in the ancient books. At the same time it is im-
 "possible to indicate them universally, because they may be infi-
 "nitely diversified by the situation and character of the parties, by
 "the state of general manners, and by many other incidental cir-
 "cumstances apparently slight and delicate in themselves, but
 "which may have most important bearings in decisions upon the
 "particular case. The only general rule that can be laid down upon
 "the subject is, that the circumstances must be such as would
 "lead the guarded discretion of a reasonable and just man to the
 "conclusion; for it is not to lead a rash and intemperate judg-
 "ment, upon appearances that are equally capable of two inter-
 "pretations; neither is it to be a matter of artificial reasoning
 "judging upon such things differently from what would strike the
 "careful and cautious consideration of a discreet man. The facts
 "are not of a technical nature; they are facts determinable upon
 "common grounds of reason, and Courts of Justice would wander
 "very much from their proper office of giving protection to the
 "rights of mankind, if they let themselves loose to subtilties and
 "remote and artificial reasonings upon such subjects. Upon such
 "subjects the rational and the legal interpretation must be the
 "same. It is the consequence of this rule that it is not necessary
 "to prove a fact of adultery in time and place; circumstances
 "need not to be so specially proved, as to produce the conclusion
 "that the fact of adultery was committed at that particular hour
 "or in that particular room; general cohabitation has been
 "deemed enough."

The appeal was dismissed with costs, and the decree *nisi* was made absolute.

Mr. *Creagh* applied for permanent alimony, citing *Keats v. Keats and Montezuma* (1), and that the wife might have access to her child.

Mr. *Marindin*, contra, cited *Winstone v. Winstone and Dyne* (2), *Ratcliff v. Ratcliff and Anderson* (3), and *Thompson v. Thompson and Sturmffells* (4), as to access.

(1) 1 S. & T., 334.

(3) 1 S. & T., 467.

(2) 2 S. & T., 246.

(4) 2 S. & T., 402.

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Mr. *Creagh* in reply.

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PEACOCK, C. J,—The cases which have been cited establish that, under the English Divorce Act, the Court has power to award permanent alimony to the wife, even when a husband obtains a divorce on account of adultery committed by her; and I have no doubt that, under section 37 of Act IV of 1869, this Court may order permanent alimony to the wife under similar circumstances. The first clause of section 37 enacts that “the High Court may, if it think fit, on any decree absolute, declaring “a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, order that the husband shall, to the “satisfaction of the Court, secure to the wife such gross sum of “money or such annual sum of money, for any term not exceed- “ing her own life, as, having regard to her fortune (if any), to “the ability of the husband, and to the conduct of the parties, “it thinks reasonable;” and clause 4 says that, “in every such “case, the Court may make an order on the husband, for payment “to the wife, of such monthly or weekly sums for her maintenance and support as the Court may think reasonable.”

It was contended in the course of argument that the words “obtained by the wife” at the end of the 1st clause of section 37, overrode the whole of that clause; and that, consequently, the power given to the Court to order alimony was only when a decree absolute declaring a marriage to be dissolved should be obtained by the wife. But that is clearly not the grammatical construction of the clause, for two different kinds of decrees are evidently referred to,—the first is on any decree absolute declaring a marriage to be dissolved; the second, following the word “or,” on any decree of judicial separation obtained by the wife.

I have no doubt that the intention of the Legislature by this section was to give the High Court the same power as the Courts have in England, and that the grammatical construction is the correct one; and consequently that the Court may, if it think fit, on any decree absolute, declaring a marriage to be dissolved on account of the adultery of the wife, make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable.

The evidence in this case did not satisfy me that the husband was conniving at the adultery of his wife, or that he had been guilty of such wilful neglect or misconduct of or towards her as would justify the Court in refusing to pronounce a decree of divorce, under the 4th clause of section 14; but I do think that, in this case, the husband did not take that care of his wife which he ought to have done; for it appears from the evidence that he allowed her to go out to parties alone without accompanying her; and that he allowed her, on those occasions, to remain out until late hours of the night. The co-respondent has absconded, and there appears to be no hope that he will make any provision for Mrs. Kelly. Under these circumstances, the question is whether a small sum should be allowed to her for maintenance and support, or whether she should be left in a state of destitution.

From the affidavit of Mr. Kelly, it appears that his pay amounts to rupees 519-8 a month, and that his marriage expenses are rupees 443-12. He has two daughters, one by the respondent, Mrs. Kelly, and one by his former wife; and he swears in his affidavit that he fully expects that he will be obliged to retire on his pension at the end of the present year, and that then his income will be reduced from rupees 519-8 to rupees 220-12. The petitioner has offered to settle on Mrs. Kelly the damages which he may recover in the suit, but there appears to be very little prospect that those damages will be ever realized.

Under these circumstances, it appears to the Court to be reasonable that the Court should make an order on the husband, under clause 4, section 27 of Act IV of 1869, for the payment to Mrs. Kelly, the respondent, for her maintenance and support, of the sum of rupees 50 a month, so long as she continues to lead a chaste and proper life, and continues unmarried.

In addition to that, we think that Mr. Kelly ought to settle upon Mrs. Kelly any amount which may be realized of the damages awarded, for her benefit, so long as she continues chaste and unmarried; and after her death, or on forfeiture of that amount on account of any misconduct, the amount shall be for the benefit of the child by her.

The cases seem to establish that the wife is not entitled to

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have access to the children of the marriage, when the marriage has been dissolved on account of her adultery. We cannot, therefore, order that Mrs. Kelly should be allowed to see the child.

We think that Mrs. Kelly ought to be allowed the costs of this motion for alimony out of, and not exceeding, the amount of the balance in Court. These costs will be taxed on the same scale as that on which her costs were taxed in the original suit. The costs of the settlement of the damages recovered will be paid out of the amount, if any, recovered.

Attorney for appellant : Baboo D. C. Dutt.

Attorneys for respondent: Messrs. Robertson and Co. and Mr. Leslie.

1870
 Jan. 11.

Before Sir Barnes Peacock, Kt Chief Justice, and Mr. Justice Macpherson.

GOBARDHAN BARMONO v. SRIMATI MANI BIBI.

Appeal to Privy Council, Petition of—Delay in Transmission—Power of High Court to strike it off the File.

Until a petition of appeal to the Privy Council presented to the High Court has been admitted and allowed, a party has no right of appeal to the Privy Council. If the petition is allowed to remain on the file of the Court, and is not prosecuted within a reasonable time, the Court has power to order its removal from the file.

THIS was an appeal from the decision of Mr. Justice Phear, refusing an application to strike a petition of appeal to the Privy Council off the file for delay in prosecuting it.

The case on the original hearing is reported in Volume 3, B. L. R., O. C., 126.

Mr. Jackson for the appellant contended that there was no rule that a petition of appeal must be filed within twelve months, after leave to file has been granted; that the application of the respondent should have been made before the Privy Council, and that this Court had no power to entertain it; and further that this appeal ought to be allowed, as it came within the provisions of the 30th section of the Charter of the

Supreme Court, refereing to *Woomeschunder Paul Chowdry* 1870
v. Issenchunder Paul Chowdry (1) and *Gordon v. Lowther* (2).

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Mr. *Graham* (Mr. *Bonnerjee* with him) for the respondent contended that, as the petition had only been filed, and not allowed, it had not gone out of the jurisdiction of this Court, citing, in support of his argument, *Sreemutty Ranees Hurro-soondery Dossee v. Cowar Kistenauth Roy* (3); and further that, as the appellant had taken no steps towards prosecuting the appeal, that the appeal ought to be struck off the file: *Woomeschunder Paul Chowdry v. Issenchunder Paul Chowdry* (1), *Sreemutty Rabutty Dossee v. Radanauth Sen* (4), *St Louis v. St. Louis* (5). Until the petition of appeal is lodged, the Judicial Committee of the Privy Council have no jurisdiction to entertain any application in an appeal: *Gungadhur Seal v. Sreemutty Radhamoney Dossee* (6).

Mr. *Jackson* in reply.

The judgment of the Court was delivered by

PEACOCK, C. J.—I think that the learned Judge had power to dismiss this petition. The petition is not an appeal to Her Majesty in Council, but it is a petition to this Court directed to the Chief Justice and his companion Judges, stating that the petitioner feeling himself aggrieved is desirous of appealing to Her Majesty in Council. It is an application to this Court that all necessary orders may be made to enable the petitioner to appeal to Her Majesty in Council, and that seems quite in conformity with section 30 of the Charter of the late Supreme Court, which says that in all cases in which “any person shall find him, her, “or themselves, aggrieved by any judgment, decree, order, or “rule of the said Supreme Court of Judicature at Fort William in Bengal, it may be lawful for him, and them, to appeal

- (1) *Morton's Rep.*, 59, 160
- (2) 2 *Ld. Raym. Rep.*, 1447.
- (3) *Fulton's Rep.*, 10.

- (4) 6 *Moore's L. A.*, 346.
- (5) 1 *Moore's P. C.*, 143.
- (6) 9 *Moore's P. C.*, 411.

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“ to us, our heirs or successors, in our or their Privy Council,
 “ in such manner, and under such restrictions and qualifications,
 “ as are hereinafter mentioned,—that is to say, in all judgments,
 “ decrees, or decretal orders made by the said Supreme Court
 “ of Judicature at Fort William in Bengal, in any civil case,
 “ the party and parties against whom, as to whose immediate
 “ prejudice the said judgment, decree, or decretal order shall be
 “ or tend, may by his or their humble petition, to be preferred
 “ for that purpose to the said Supreme Court of Judicature
 “ at Fort William in Bengal, pray leave to appeal to us, our
 “ heirs or successors in our or their Privy Council, stating in
 “ such petition the cause or causes of appeal; and in case
 “ such leave to appeal be prayed by the party or parties,
 “ who is at once directed to pay any sum of money, or to
 “ perform any duty, the said Supreme Court of Judicature
 “ at Fort William in Bengal shall and is hereby empowered
 “ to award that such judgment, decree, or order shall be carried
 “ into execution, or that sufficient security shall be given for
 “ the performance of the said judgment, decree, rule, or order,
 “ as shall be most expedient to real and substantial justice;
 “ provided always that, when the said Supreme Court of Judi-
 “ cature at Fort William in Bengal shall think fit to order the
 “ judgment, decree, rule, or order to be executed, security shall
 “ be taken from the other party or parties for the due perform-
 “ ance of such order or decree, as we, our heirs, or successors,
 “ shall think fit to make thereupon; and in all cases, we will
 “ and require that security should also be given, to the satis-
 “ faction of the said Supreme Court of Judicature at Fort
 “ William in Bengal, for the payment of all such costs as the
 “ said Supreme Court of Judicature at Fort William in Bengal
 “ may think likely to be incurred by the said appeal, and also
 “ for the performance of such judgment or order as we, our
 “ heirs or successors, shall think fit to give or make thereupon;
 “ and upon such order or orders of the said Supreme Court of
 “ Judicature at Fort William in Bengal, thereupon made, being
 “ performed to their satisfaction, the said Supreme Court of
 “ Judicature at Fort William in Bengal shall allow the appeal,
 “ and the party or parties so thinking him, her, or themselves

"aggrieved, shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs or successors, in our or their Privy Council, in such manner and form and under such rules as are observed in appeals made to us, from our plantations or colonies, or from our islands of Guernsey, Jersey, Sark, or Alderney." Thus it is not until a petition is presented to this Court upon proper security that the party has a right to prefer his appeal to the Privy Council.

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Section 31 applies to a case in which an appeal has been allowed. It says that "in all such cases, the Supreme Court shall certify and transmit, under its seal, to the Privy Council, a true and exact copy of all the evidence, proceedings, judgments, decrees, and orders had or made in such causes appealed," so that it is not until a petition is allowed that the transcript of the record is to be sent to Her Majesty in Council.

By the orders of Her Majesty in Council of 1838, section 6 (1), it is said that, "in default of the petition of appeal of the appellants being lodged in the Privy Council Office, within three calendar months from the registration of the arrival of the transcripts, or in default of the appellant's case being carried in within one year from the time of such registration, the respondent shall be entitled, in either case, to move to dismiss the appeal for want of prosecution."

It appears to me, therefore, that, until the petition presented to this Court is admitted and allowed, a party has no right to appeal to Her Majesty in Council. If the petition is allowed to remain on the files of the Court, and is not prosecuted within a reasonable time, the Court has the power to order its removal from the files. In this case Mr. Justice Phear has given his reasons for thinking that the petitioner has not shown sufficient grounds for the delay in prosecuting his appeal, or for being allowed to proceed with it now, and I see no reason to differ from the learned Judge in that respect, and, consequently, I think that the present appeal from his judgment ought to be dismissed with costs.

I may also add that, by section 39 of the recent Charter by

(1) Smolt and Ryan's Rules and Orders, App. 106

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which the power to appeal to Her Majesty in Council is allowed, it is to be "subject to such rules and orders as are now in force, or " may from time to time be made respecting appeals" to Her Majesty in Council from the Courts in the Presidency.

Attorney for appellant : Mr. *Fink*.

Attorneys for respondent: Messrs *Judge* and *Gangooly*.

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Markby.

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 March 10.

IN THE GOODS OF GANGA PRASAD GOSAIN.

Majority, Age of, of Hindus—Act XL of 1858.

See also
 15 B. L. R. 74
 10 B. L. R. 231.

A Hindu, domiciled with his family at Serampore, in the Zilla of Hooghly, died leaving a will, in which was the following direction :—

"In order to look after the affairs, to conduct suits and manage the debts and dues relative to my real and personal estates, my eldest son, H. C. G., who has attained the age of majority, remains executor, for my younger son, G. C. G., is an infant; but as my eldest sister, S. H. D. is prudent and sensible, all the affairs of the estates shall be under her superintendence; and my eldest son shall do all the acts according to her advice and direction. But when my younger son, G. C. G. will then come of age, both the brothers shall be competent personally to manage the affairs; at that time the advice and superintendence of my said sister shall not remain."

G. C. after attaining the age of 16, but before he had reached the age of 18 applied for grant of probate of his father's will to himself, jointly with his brother H. C., in respect of property in Calcutta. Held that he had not attained the age contemplated in his father's will at which he was to be joined in the executorship with his brother.

THIS was an appeal from an order of Mr Justice Macpherson rejecting an application for probate on behalf of the testator's younger son, Sriman Gopal Chandra Gosain.

The facts of the case, and the judgment of Macpherson, J., will be found in 4 B. L. R., App., 43.

Mr. *Woodroffe* and Mr. *Marindin* for appellant—Where a testator talks of majority, he means majority according to the law

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in force among the persons of whom he is one. In this case he was a Hindu, and "majority" would mean majority according to Hindu law. By that law the age of majority is the end of the 15th year—1 Macnaghten's H. L., 103. In the case of *Mangala Devi v. Dinanath Bose* (1), it was contended that a son was a minor, he being between 16 and 18; but the Court did not call upon the opposite counsel to argue that point, seeming to allow that he was not a minor. Act XL of 1858 does not apply to this Court. It is an Act relating to the Court of Wards, and would not be applicable to Calcutta. Section 29 of the Act implies it is not in force in the local limits of the jurisdiction of this Court. Regulation XXVI of 1793, section 2, the other provision on the subject, does not apply, it not having been registered under 13 George III, c. 63, s. 36. See the case of *Jogendro-narain Deb Roykut v. Temple* (2). The age of majority may be considered to be different in different jurisdictions; for instance by English law all persons under the age of 21 are considered minors, without reference to the period of majority in their native countries—Macpherson on Infants, 576. It by no means follows that, if Act XL of 1858 applies to a person at Serampore, he may not, in another place, where that law does not prevail, be able to get probate. Again, a minor left without property would come of age at 16, while one to whom property had been left would do so at 18. [NORMAN, J.—Would not the Full Bench decision on Act XL of 1858 prevent that?] That Act only affects minors with property. [NORMAN, J.—I remember a case in which I was of opinion that, by section 56, Act XL of 1858, a minor for the purposes of the Act might make a will.] If he can make a will, he is entitled to probate.

Mr. *Marindin* on the same side. The son being a Hindu, came of age at 16, except for some special purposes, for which he is disqualified by Act XL of 1858. It was the intention of the testator that he should come of age at the period when Hindus by their law are considered of age; if the intention had been that his son should come of age, with reference to some special Act, he would have so expressed it. It has no doubt been

(1) 4 B. L. R., O. C., 72.

(2) 2 Ind. Jur., N. S., 234.

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decided that the full age, according to Act XL of 1858, in the case of a person to whom that Act applies, is 18 years for other purposes than those contemplated by the Act: *Madhusudan Manji v. Debigobindo Newgi* (1): but that Act does not apply in this Court; the son therefore is entitled to probate in respect of the assets in the jurisdiction of this Court.

NORMAN, J.—Gopal Chandra Gosain prayed for an order that probate of the will of his father, Gangaprasad Gosain, should be granted to him under a power reserved to him for that purpose upon a grant of probate to his elder brother, Hem Chandra Gosain. Gengaprasad Gosain, the deceased, was in his life-time, and at the time of his death, a Hindu, living at Serampore, in the Zillah of Hooghly. He died in December 1864, leaving a will, which contained the following paragraph:—

“In order to look after the affairs, to conduct suits and manage the debts and dues relative to my real and personal estates, my eldest son, Sriman Hem Chandra Gosain, who has attained the age of majority, remains executor, for my younger son, Sriman Gopal Chandra Gosain, is an infant; but as my eldest sister, Srimati Harumani Dabi, is prudent and sensible, all the affairs of the estates shall be under her superintendence; and my eldest son shall do all the acts according to her advice and direction. But when my younger son, Sriman Gopal Chandra Gosain, will then come of age, both the brothers shall be competent personally to manage the affairs; at that time the advice and superintendence of my said sister shall not remain.”

Gopal Chandra Gosain, having now attained the age of 16 years, applied for probate to Mr. Justice Macpherson, and that application was rejected.

The question is whether, under the terms of the will of Gangaprasad Gosain, Gopal Chandra Gosain is entitled to probate as executor, jointly with his brother, at the age of 16 years, or whether he will not be so entitled until he attains the age of 18 years. Now the first thing which it is necessary to observe is that the parties were all domiciled at Serampore, and

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therefore Gopal Chandra Gosain is clearly a person, whose minority and the right to appoint a person to take charge of whose property as a minor, is regulated by the provisions of Act XL of 1858. It is clear that, until Gopal Chandra Gosain attains his full age of 18 years, he would be liable either to have his property taken charge of by the Court of Wards, or by a relative or friend, or other person appointed by the Court on a petition under Act XL of 1858.

The will of Gangaprasad Gosain provides for the time at which Gopal Chandra Gosain is to be associated as executor with Hem Chandra Gosain. It says that, when he comes of age, both the brothers shall be competent personally to manage their affairs. Now it is clear that it cannot be said that Gopal Chandra Gosain will be personally competent to manage his affairs, as long as he is liable as a minor to have his person and property put under the charge of a guardian. The coming of age to which the father alluded in his will means, in my opinion, coming to an age when Gopal Chandra Gosain will be no longer under any such disability.

The decision in the case of *Madhusudan Manji v. Debigobindo Newgi* (1) goes very much further than it is necessary for us to go for the purposes of this decision. For the purposes of Act XL of 1858, in ascertaining whether Gopal Chandra Gosain is a minor, for the custody of whose person and property orders may be made under that Act, it is clear that Gopal Chandra Gosain must be held to be a minor, until he has attained the age of 18 years.

I am therefore of opinion that Gopal Chandra Gosain has not attained the age at which by his father's will it is provided that he shall be joined in the executorship with his brother; and I am confirmed in that opinion, by the consideration, that his father must have contemplated his coming of age at one single certain time. There is nothing in the will to shew that the father meant that, as to property in Calcutta, Gopal Chandra Gosain should come of age, and obtain probate at the age of 16 years, but that he should not come of age, and not be entitled to a certificate, with respect to property at Serampore, until he attains the age of 18 years.

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For these reasons I am of opinion that the decision of Mr. Justice Macpherson is correct, and must be affirmed.

MARKBY, J.—I am of the same opinion.

Proctors : Messrs. *Swinhoe, Law, & Co.*

[APPELLATE CIVIL].

Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

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April 23.

MUSSAMAT RANI KHIJARANNISSA (DEFENDANT) v. RANI RISAN-
NISSA BEGUM (PLAINTIFF.)*

*Mahomedan Law—Dower—Prompt Dower—Deferred Dower—Limitation—
Act XIV of 1859, s. 1, cl. 9.*

See also
15 B. L. R. 306

A Mussulman, on his marriage, entered into a written agreement (unregistered) with his wife to pay her a lakh of rupees, one-fourth as prompt (*mooujjul* dower, the remainder as deferred (*moowujjul*) dower. A separation occurred between the husband and wife, but there was no divorce. During the separation, on third May 1861, the wife petitioned for leave to sue as a pauper to recover the balance of her prompt dower. The husband on the 1st July 1861, filed a petition denying her claim against him. The wife's application to sue as a pauper was rejected on 27th January 1862. The husband died on 30th August 1867. On the 13th May 1869, the widow brought her suit to recover the balance of prompt dower and the whole of the deferred dower. *Held*, that she could only recover the latter. The cause of action, in respect of deferred dower, could not arise until the husband's death. But the cause of action, in respect of prompt dower, arises upon demand by the wife, and refusal by the husband. In this case there was a demand by the wife, and a refusal by the husband, *vis.*, in their petitions of 3rd May and 1st July 1861, respectively, more than three years before suit, therefore the claim to prompt dower was barred by clause 9, section 1, of Act XIV of 1859.

Ameeroonissa v. Mooradonissa (1) distinguished.

THIS was a suit brought on the 13th May 1869, to recover the amount of dower, *minus* the amount already received by the plaintiff.

* Regular Appeal, No. 243 of 1869, from a decree of the Subordinate Judge of Purneah, dated the 4th September 1869.

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The plaintiff stated that the cause of action arose on the date of the death of the plaintiff's husband, *viz.*, on the 15th Bhadra 1275 Mulki, corresponding with the 30th August 1867; that, on the day of marriage of the plaintiff with the late Raja Enaet Hossein that is, on the 18th Asar 1246 Mulki (July 1st, 1839), the said Raja executed a kabinnama in favor of the plaintiff, agreeing thereby to pay a lakh of rupees to the plaintiff as her dower; that rupees 2,000 had been paid on different dates as part of her prompt dower; and that the plaintiff's husband had died before payment of the remaining amount of dower. Hence the suit. The plaintiff further stated that, out of the amount secured by the kabinnama, one-fourth was "prompt (*moouljjul*) dower," and the remainder "deferred (*moowujjul*) dower."

The defendant, Rani Khijarannissa, the second wife of Raja Enaet Hossein, set up (*inter alia*) that there was a separation between Raja Enaet Hossein and the plaintiff about 21 or 22 years ago; that the cause of action arose at the time of the separation; that the claim was barred by lapse of time; that since no suit had been brought within six years from after the dismissal, on 27th January 1862, of a petition by the plaintiff, to sue her husband in *forma pauperis*, her claim was barred by lapse of time.

The Subordinate Judge found that there was no divorce of the plaintiff from her husband, and held that the cause of action arose on the date of Raja Enaet Hossein's death, and consequently the suit was not barred by lapse of time. He further found that the kabinnama was proved, and accordingly, passed a decree in favor of the plaintiff.

The defendant, Rani Khijarannissa, appealed to the High Court.

Mr. Money (Mr. Allan, Mr. Twidale, and Munshi Amir Ali with him) for appellant.

Baboo Anukul Chandra Mookerjee and Mr. C. Gregory for respondent.

The following cases and authorities were referred to in argument:—*Ameeroonissa v. Mooradoonissa* (1); *Mussamat Beebee* (1) 6 Moore, s. I. A., 211.

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Jumeela v. Mussamat Mulleeka (1) ; *Meer Nujibollah v. Mussamat Doordana Khatoon* (2) ; The Hedaya, Volume I, page 150 : Macnaghten's Mahomedan Law, page 59, 278 ; Baillie's Mahomedan Law, pages 92, 124, 126 ; *Noorunnissa Begum v. Nawab Syed Mohsin Allee Khan Bahadoor* (3) ; *Hosseinooddin Chowdhree v. Tojunnissa Khatoon* (4) ; *Golucknath Dutt v. Seetaram Gowar* (5) ; and *Vinayak Dharle v. Bhau Samvat* (6).

LOCH, J. (After stating the facts.)—The points raised in appeal are, first, that the claim in regard to that portion of the dower which is prompt is barred by the Law of Limitation ; second, that the claim in regard to the portion of the dower which was deferred is also barred by limitation ; third, that the document, *i. e.*, the kabinnama or, deed of dower propounded by the plaintiff, and on which she relies, is a forged document, and was not executed by Enaet Hossein.

The fact of the marriage of the plaintiff with Raja Enaet Hossein is admitted. It is also admitted that she separated from her husband about 1259 Mulki (1851), and was living separate from him, when he died in 1867, though there had been no divorce. The date of Raja Enaet Hossein's death is not disputed.

We proceed to take up the objections raised in appeal in the order in which they are given above, and first as regard the application of the Law of Limitation to that part of the dower which is admittedly prompt.

Looking at the terms of the deed of dower, it is clear that one-fourth was prompt, *i. e.*, payable at the time of the marriage, payable immediately. Looking to the authorities on Mahomedan law, Hedaya, Volume I, page 150 (Ed. of 1791), it appears that it is only by payment of the "prompt dower" that the husband is entitled to consummate the marriage ; that till this be paid, the woman may refuse to allow her husband to have connection with her ; and even if he should have had such

(1) W. R., 1864, 252.

(2) 1 Sel. Rep., 103.

(3) 7 Sel. Rep., 40.

(4) W. R., 1864, 199.

(5) 1 Hay's Rep., 378.

(6) 4 Bom. H. C. Rep., A. C. J., 39.

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connection, or been in complete retirement with her, she may refuse to admit him again, until she has received the whole of the prompt dower. Macnaghten in his Principles of Mahomedan Law says, page 59, Rule 20, in the Chapter on Marriage:—"A necessary concomitant of a contract of marriage is dower, the maximum of which is not fixed, but the minimum is ten dirhems, and it becomes due on the consummation of the marriage (though it is used to stipulate for delay as to the payment of a part), or on the death of either party, or on divorce." In Baillie's Digest of Mahomedan Law, page 124 (and there appears to be no difference in this respect between the two sects) we have the same doctrine laid down: "A woman may refuse herself to her husband, as a means of obtaining payment of so much of her dower as is *mooñjjul* or prompt; and in like manner her husband cannot, until such payment has been made, lawfully prevent her from going out of doors, or taking a journey, or going on voluntary pilgrimage." Again in page 126:—"When the parties have explained how much of the dower is to be *mooñjjul*, or prompt, that part of it is to be promptly paid. Where, however, it has been stipulated that the whole is *mooñjjul*, or prompt, the whole is to be so to the rejection of custom altogether." It is clear, therefore, from the quotations above made, that prompt dower, unless delay be stipulated for and agreed to, becomes due, and should be paid at the time of the marriage.

It has been very properly pointed out to us by Mr. Money for the appellant, that all the cases given in Macnaghten's Principles of Mahomedan Law are expositions of that law given by learned *moulvis* as known to and taught by them; that a Law of Limitation is unknown to the Mahomedan law, either as regards debts or dower, or any other claim; that as regards ordinary debts, the Law of limitation introduced by the Regulations of 1793 has been held applicable, as also the recent Act XIV of 1859 and consequently there is no valid reason why that law should not be equally applicable to claims for dower which was always treated as debt by the Mahomedan law. It is contended, therefore, for the appellant, that, as the prompt dower became due on the date of the marriage, a suit to recover the amount

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should have been brought within twelve years, the period allowed by the law of 1793, from that date ; that, if the Court, with reference to the judgment of the Privy Council in the cases of *Ameeroonssia v. Mooradoonissa* (1) and of *Mussamat Beebee Jumeela v. Mussamat Mulleeka* (2), think that, as no demand was then made, limitation will not run from date of Marriage, then it is contended a distinct demand was made in 1861, when the plaintiff applied to the Court for permission to file a suit in *formâ pauperis* against her husband to recover the amount of the dower in the kabinnama. Her husband repudiated the claim, and denied having executed the document, and the plaintiff's application was rejected on 27th January 1862.

Two cases from the Select Reports have been quoted in support of the contention that the Law of Limitation is applicable to a claim for " prompt dower." The first is *Meer Nujibollah v. Mussamat Doordana Khatoon* (3), and the Judges who disposed of the case say :—" With respect to the deed of settlement, it was held " that the claim to the two-thirds of the dower which were not exigible during the marriage, or in other words, were payable on the " decease of the husband, was not affected by the rule laid down " in the Regulation of limitations, as, at the commencement of " the present suit, twelve years had not elapsed since the husband's death ; but the recovery of the remaining third, specified as payable on demand, was held to be barred by the Regulation, in consequence of the long period (about forty years), " which had elapsed since it became due, without any demand " having been made." That case is similar in many respects to the one before us. The husband in that case settled 5,000 gold mohurs, or rupees 80,000, on his wife, of which one-third was *mooûjjul*, or payable immediately, and two-thirds *moowûjjul*, or not exigible, during the continuance of the marriage. The law officers, when consulted, gave it as their opinion that, " under the " Mahomedan law, the cognizance of claims for dower could not " be limited to any specific term, and that both the part which " was payable on demand, and that which was not exigible during " marriage, were equally recoverable from the estate of the

(1) 6 Moore's I. A., 211. (2) W. R., 1864, 252. (3) 1 Sel. Rep., 103.

"husband." Yet, in the face of this opinion, the Judges held that the claim for the one-third prompt dower was barred by the Law of Limitation, so long a period having elapsed without any demand being made. The second case is *Noorunnissa Begum v. Nawab Syed Mohsan Allee Khan Bahadoor* (1). The judgment follows that in *Meer Nujibollah v. Mussamat Door-dana Khatoon* (2). In this case, however, the husband was alive, and the wife's claim for the exigible dower was held to be barred by the Law of Limitation; and it was also held that no claim could lie for the dower not exigible until the death of the husband, or the dissolution of the marriage by divorce. In this case, though it appeared that the parties were living separately, there was no evidence of a divorce, and the appeal was dismissed.

We now turn to the case of *Ameeroonissa v. Mooradoonissa* (3) decided by the Privy Council in 1855. In this case Mooradoonissa, the defendant, claimed a dower of rupees 46,000, recoverable from the estate of her husband, Syud Mustafa. The plaintiff in this case, Syud Abdulla, the heir-at-law, denied that Mooradoonissa had been married to his brother Mustafa, and further pleaded that, as the deed of dower set up by Mooradoonissa created a debt demandable and payable immediately, the claim was barred by the Law of Limitation, III of 1793, section 14, more than twelve years having elapsed since the alleged marriage. In disposing of the appeal, their Lordships of the Privy Council, after quoting the above section of Regulation III of 1793 *in extenso*, refer to the last words of the section, which run thus:—"Or shall prove that either "from minority or other good and sufficient cause, he had been "prevented from obtaining redress," and they say, "this may "probably be a case fit to be dealt with, under the concluding part "of this Regulation, there may be such 'good and sufficient cause;' "but their Lordships do not desire to put their decision on that "point, the terms of the deed are 'when demanded by my wed-ded wife.'" They then refer to certain classes of obligation payable on demand, and others which contain no provision to pay on demand, and are therefore payable immediately; and after

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(1) 7 Sel. Rep., 40.

(3) 6 Moore's I. A., 211.

(2) 1 Sel. Rep., 103.

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referring to certain cases disposed of in the Courts of law in England relating to cases in which it had been ruled that an express demand must be made before the action could be maintained, their Lordships go on to say :—" It is quite unnecessary that there should be any demand here. The deed of dower, or settlement by the husband in favor of his wife, and the intention of the parties was that the wife, was to have, as a dowry, the sum of rupees 46,000 ; and it is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument. It would be full of danger to the happiness of married life ; and we think upon the true construction of this settlement, she had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately, or in his life-time. Their Lordships are therefore of opinion that the Regulation does not apply as a bar to the claim, and that such defence entirely fails." It is contended by Mr. Money that their Lordships' judgment rests on the peculiar wording of the deed of dower in this case,—" when demanded by my wedded wife ;" that it was a case where a demand was to be made, and the right of action would accrue to the party from the date of such demand ; but in the case before the Court, the only words used were " prompt " and " deferred," and that the prompt portion was payable at once. It was not like a note which ran in these terms :—" On demand I promise to pay," and so no demand was necessary. Looking however to the words of their Lordships, it appeared that, though the words, " when demanded by my wedded wife," were inserted in the deed of dower, yet no demand was necessary to give the wife a cause of action, for they say :—" We think upon a true construction of this settlement, she had a right of suit without a previous demand, and further though she had this right, and might have exercised it any time, yet she was not obliged to sue her husband immediately, or in his life-time." And they further held that the Law of Limitation was not applicable to bar the claim, and why ? because " it would be inconvenient were a married woman obliged to bring an action against her husband upon such an instrument, and it would be full of danger to the happiness of married life." It appears very clear that

their Lordships did not rest their judgment on the words of the deed, but looked upon the dower as "prompt," for which a suit might be brought at any time without a demand; but that, for the sake of the domestic happiness of families, a suit to recover the amount must not be brought during the life-time of the husband, and consequently that the Law of Limitation then in force did not apply. I do not see that any other construction can be put upon their Lordships' words. If so, the fact that the present Law of Limitation, Act XIV of 1859, which was in operation when the present suit was brought, is more stringent in its terms, does not really affect the question, for it does not meet the reason assigned by their Lordships for holding the claim in the case of *Ameeroonissa v. Mooradonissa* not to be barred (1). It was true that the parties had lived separately for a long time but still they might have been reconciled, and the evidence for the plaintiff goes to show that the late Raja did make various attempts to be reconciled, and promised in his statement to the Magistrate to maintain his wife if she returned to his house. Had she brought a suit when they separated, or been obliged to do so within a certain period from the time they first quarrelled and separated, there would have been no hope of a reconciliation. But it is said that, in this case, a suit was actually brought in the life-time of the husband, and there was then a positive demand for the payment of the dower; and, under these circumstances, the present suit should have been brought within the period prescribed in clause 9, section 1, Act XIV. of 1859.

Before however we proceed to consider this part of the question, it is necessary to refer to two other cases, *Hossainooddeen Chowdhree v. Tajunnissa Khatoon* (2) and *Mussamat Beebee Jumeela v. Mussamat Mulleeka* (3). In the first of these cases, it was held (by Trevor and Glover, JJ.) that, "according to "Mahomedan law *mooujjul*, or exigible dower, is payable on "demand at any time from the consummation of the marriage up "to the death of the wife. *Mooujjul* dower is payable on demand "at any time during the wife's life, but her heirs must be placed "in the same category as all other suitors, and file their claim

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(1) 6 Moore's I. A., 211

(3) W. R., 1864, 252.

(2) W. R. 1864, 199.

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"within twelve years of their obtaining the right to sue. The
"appellant's allegation that the cause of action arose on
"the consummation of the marriage, is opposed to the Mahome-
"dan law, and to the principle laid down by the Privy Council in
"*Ameeroonissa v. Mooradoonissa* (1). The dower was no doubt
"payable to Afsurunissa on that date, and she might have
"demanded it then had she been so minded ; but she had equal-
"ly a right to let it remain in her husband's hands, he acting as
"her trustee ; and as her power to claim it of him at any time
"ceased only with her life, the plaintiffs' (respondents') cause
"of action must be held to have commenced then, and not on
"their first demand for dower." The other case, *Mussamut
Bebae Jumeela v. Mussamut Mulleeka* (2), follows the ruling
laid down by the Privy Council in *Ameeroonissa v. Mooradoonis-
sa* (1). In *Mussamut Bebae Jumeela v. Mussamut Mulleeka* (2),
there was no deed of dower. The dower was granted verbally at
the time of marriage, and nothing was then said of its being
prompt or deferred. By Mahomedan law, Macnaghten's Prin-
ciples, page 59, Rule 22, if it be "not expressed, whether the
"payment of the dower is prompt or deferred, it must be held
"that the whole is to be due on demand." The Judges who
decided the case of *Mussamut Bebae Jumeela v. Mussamut
Mulleeka* (2) held that, though by the Mahomedan law, owing to
the absence of words defining the nature of the dower, it was
actually exigible, "yet that both parties, as shown by their
"conduct, considered it to be deferred ; and therefore Jumeela,
"though separated from, and being on bad terms with, her
"husband, did not sue, because she did not think the dower was
"claimable till after his death." The Judges conclude their
judgment in these words :— "Considering therefore that, as
"nothing was determined at the marriage, whether the dower
"were to be exigible or deferred, it must, under the Mahomedan
"law, be considered exigible (prompt), and as such demand-
"able and recoverable from the husband at any period during
"coverture, and also recoverable from him after divorce, or
"from his estate after death, if the action be brought within

(1) 6 Moore's I. A., 211.

(2) W. R., 1862, 252.

"the period of limitation prescribed by law ; and as it has been held by the Privy Council that such claim, though due, need not be sued for immediately, or during the life-time of the husband, and as the divorce has not been proved, we think the plaintiff has brought her suit in time." In *Mussamat Bebee Jumeela v. Mussamat Mulleeka* (1), it was urged that the judgment of the Privy Council in *Ameeroonissa v. Mooradoonissa* (2) did not apply, because there was no danger of destroying domestic felicity, as the parties had separated, being unable to live together. With regard to this argument, the Judges remark :— "It is sufficient to say that, if the ruling of the Privy Council goes to the extent of saying that exigible (prompt) dower, though demandable at any time during coverture, need not be sued for during the life of the husband, and we believe this to be the opinion of that Court, then the present plaintiff would not be debarred from bringing her suit after her husband's death, though her domestic felicity had been destroyed by his ill usage which led to their separation ;" and then the Court go on to show why, from the conduct of the parties, notwithstanding the rule of Mahomedan law, the dower in this case was held to be deferred, and not prompt.

It may be as well, before proceeding further to ascertain, if possible, in what sense Macnaghten uses the words in Rule 22 of Chapter VII of the Principles "due on demand." Are they equivalent to the term "prompt," or have they the meaning on which they appear to be used in the judgments quoted above, a sum payable on a demand being made for the payment. In a note to case 29, page 278, cited in the Principles of a deed of dower not specifying whether the payment shall be prompt or deferred, he says :—"There may be a stipulation for prompt payment of dower or for deferred payment, or there may be no mention whether it is to be deferred or prompt. In the first case and the last, the prevalent doctrine appears to be that the whole should be paid promptly." This passage explains the meaning of the words "due on demand" to be equivalent to the word "prompt." Again, in a note to Case 30, Macnaghten

(1) W. R. 1864, 252.

(2) 6 Moore's I. A., 211.

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observes :—" The usage of the country is the only legal rule to be observed in controversies of this description. Had there been no mention whatever, whether the dower should be prompt or deferred, the whole must be considered to be promptly due."

The rule laid down by the Privy Council in *Ameeroonissa v. Mooradoonissa* (1) appears to be this : that, though a woman's dower be prompt, yet she is not obliged to sue for it immediately, nor in the life-time of her husband. "It may therefore be inferred," says Mr. Baillie in his Digest of Mahomedan Law, page 92, "that the time for the limitation of a suit, for even the exigible part of a woman's dower, does not begin to run until the dissolution of the marriage." But it is urged that neither the ruling of the Privy Council in *Ameeroonissa v. Mooradoonissa* (1), nor of this Court in *Mussamut Bebee Jumeela v. Mussamut Mulleeha* (2), are applicable to the present case ; for, in neither of those two cases had any demand for payment been made ; whereas in the case before the Court, a distinct claim for payment had been made by the plaintiff in 1861, and the claim denied by the defendant in distinct terms, and the plaintiff's application to sue as a pauper to recover the said money was rejected in January 1862.

The Privy Council have assigned a reason why a claim for prompt dower, need not be made till after the dissolution of marriage, viz., the danger that there would be to the continuance of domestic felicity were a woman compelled to make such a demand during coverture. In the present case there was no such reason for deterring the plaintiff from making the demand, nor was she deterred. She had long lived separate from her husband ; and however willing he might have been to be reconciled to her, she was determined not to be reconciled to him, and made a demand for her whole dower during the life-time of her husband. Admitting therefore, as it had been ruled by the Privy Council, that "prompt dower" need not be sued for during the continuance of the marriage, and that "deferred dower" cannot be sued for during coverture ; yet, if a party do exercise her right to claim prompt dower during her husband's life, and,

(1) 6 Moore's I. A., 211

(2) W. R., 1864, 252.

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while the marriage is in force, makes a demand for payment, does she not bring herself under the operation of the Law of Limitation? and if she fail to bring her action within the period allowed by law for bringing such suits, would not her claim to the prompt dower be barred as effectually as any other claim? If this be the law, it may be said that the reconciliation between the parties is almost hopeless, and the effect of the Privy Council's ruling in *Ameeroonissa v. Mooradoonissa* (1) is evaded. Married people quarrel, and in anger, the wife demands her dower; they make friends, and live peaceably as man and wife again; in such case, can it be said that the wife must, within a fixed period, bring her action for the prompt dower, or lose her right to it? Quarrels of this kind may occur continually between married couples, who may afterwards be reconciled; but if the wife be compelled by law to bring her action for dower, an almost insuperable difficulty to reconciliation would arise; and after the husband's death, the heirs would certainly plead limitation, on the allegation, true or false, that a demand for the dower had been made during the life of the husband, which had not been followed up by a suit in proper time, and so defeat the claim of the widow for that portion of the dower which was prompt.

It is very questionable whether the Privy Council, in laying down the general rule in *Ameeroonissa v. Mooradoonissa* (1) contemplated a case like the present where the wife living for many years separate from her husband formally demanded, as is alleged in Court, her dower from him. Had the question before their Lordships been that which is before us, it is not improbable that they might have held, under the circumstances, that the claim for prompt dower was barred by limitation. At any rate, their ruling in *Ameeroonissa v. Mooradoonissa* (1) does not, I think, meet all the requirements of the case. All they laid down in respect to the dower, which was prompt, was that the wife had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately or in his life-time. If however she did make the demand, and that not in a period of momentary

(1) 6 Moore's I. A., 211.

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anger, after some domestic squabble settled as speedily as excited, and from which no abiding interruption of domestic felicity ensued ; but after many years of separation, when all attempts at reconciliation had failed, and that demand was made openly, deliberately, and publicly, it appears to me that, to such a case, the ruling of the Privy Council so frequently quoted, cannot and does not, apply, and that a party making such a demand is as much barred from bringing her suit to enforce her claim within the period allowed by law, as is any other person seeking to enforce a written contract.

But it is said that no demand has been made ; that plaintiff's application in 1861 to sue as a pauper can at best be looked upon as a notice, but not as a demand. On 3rd May 1861, the plaintiff filed a petition of plaint in the Court of the Principal Sudder Ameen, setting forth that, on the occasion of her marriage with Raja Enaet Hossein, a kabinnama, by which a lakh of rupees had been settled upon her, was executed by her husband ; that of this, part, or one-fourth, was prompt, and part, or three-fourths, deferred ; that, of the prompt dower, her husband had on various occasions paid her rupees 2,000 ; and she now sued to recover the balance ; but being devoid of means, and unable to pay the stamp fees, she prayed that she might be allowed to file her suit as a pauper. On the 1st July following, a petition on the part of Raja Enaet Hossein was put in by his authorized vakeels, Moulvi Afzal Ali, Charles Chapman, and Moulvi Farzand Ali, to the effect that the plaintiff was not a pauper, the Raja at the time of her marriage having given her jewels and cash to the value of rupees 10,000 ; that the kabinnama produced by the plaintiff was a forgery ; and that plaintiff's dower was never fixed at a lakh of rupees, nor was a deed of any kind drawn up and executed ; but according to the custom of the family, the plaintiff's dower was verbally fixed at rupees 5,000. Further objections are taken to the deed that it does not bear the Raja's seal ; that the Cazi's seal thereon was obtained by collusion between him and members of the plaintiff's family ; that the claim for the prompt portion of the dower was barred by limitation, not having been sued for within twelve years of the marriage, and that the suit for the remainder of the dower was

premature. He denies having ever paid any part of the prompt dower; and urges that, if any such payment had been made, it would have been entered on the back of the deed, had that deed been a genuine document; and he adds that the allegation of payment is made to avoid the effect of the Law of Limitation.

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On 7th January 1862, Raja Enaet Hossein was examined in Court by the Principal Sudder Ameen, and the first question put to him was, "You have stated in your answer that ornaments to the value of rupees 10,000 were given by you to the petitioner, Rani Khijarannissa; that some of these ornaments to the value of rupees 6,000 were pledged by the petitioner for a sum of rupees 3,000 to a mahajan, which were afterwards redeemed and sent by you to the rani, the plaintiff. When were they sent, and are they now with the plaintiff, or have they been disposed off?" In reply to this question, the Raja gives the same details as are given in his petition of 1st July 1861 regarding these ornaments, and adds what was also stated in that petition, that the plaintiff was in receipt of an allowance of rupees 25 a month from her brother Saifallah. After this examination, a proceeding dated 27th January 1862 was drawn up by the Principle Sudder Ameen, in which he states that the plaintiff had filed a suit to recover the amount of her dower under a deed bearing date 8th Rabiassani 1254—18th Asar 1246 Mulki (July 1st, 1870); that she prayed for permission to sue as a pauper; that the case came on, Munshi Ahmed being pleader for the plaintiff, and M. Afzal Ali, M. Farzand Ali, and Mr. Chapman, pleaders for the defendant; and after reading the record, and hearing argument, it was ordered that the application of the petitioner to be allowed to sue as a pauper be rejected with costs. These proceedings appear to have been conducted under the provisions of section 305, Act VIII of 1859, and related only to the question whether plaintiff was or was not a pauper, and this was decided against her; but this much may be gathered from these proceedings, that Raja Enaet Hossein adopted the petition of 1st July 1861, put in by his vakeels in his name as his own, and must be considered to have accepted the statements made in it. He does not repudiate any part of it; but when the question is put, "You said in your answer," *i. e.*, 1st July 1861, he replies by repeating

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statements found in that answer or petition, which also contains a direct and distinct repudiation of plaintiff's demand for dower. But still it is said that, as the application to sue as a pauper was rejected, there was no demand, but only notice of a claim. I cannot consider the application in that light. It was drawn up as a plaint in a regular suit; and had the application for permission to sue as a pauper, which is written at the foot of the plaint been allowed, the petition would, under the provisions of section 308, 'Act VIII of 1859, have been numbered and registered, and been deemed to be the plaint in the suit. By a ruling of the High Court in *Golucknath Dutt v. Seetaram Gowar* (1), it was held that the suit was commenced when the application to sue in *formâ pauperis* was filed; and in another case, *Vinayak Dhavle v. Bhau Samvat* (2), it was held that a pauper suit commences for the purpose of limitation on the day when the petition to sue in *formâ pauperis* is presented to the Court, and not on the day when the application being granted, it is numbered and registered. It cannot be said that Raja Enaet Hossein was ignorant of this demand, or that the petition of 1st July 1861, in which he distinctly denied the plaintiff's claim to dower, was not written with his knowledge and consent, seeing that it was presented by his authorized pleaders who were also present, and argued the case when the application was rejected, and he himself, when examined by the Principal Sudder Ameen, admitted it to be his answer, though he did not speak to all its details. Looking, therefore, upon the Rani's application to be permitted to sue as a pauper, to be a clear, distinct, and positive demand made in a public Court to recover her dower, a demand which was as distinctly rejected by the Raja, I think her claim for so much of the dower as is prompt must be held to be barred by the Law of Limitation, clause 9, section 1, Act XIV of 1859; the suit not having been brought within three years from the date of the cause of action, viz., the refusal on the Raja's part to pay the demand then made.

On the 2nd point taken before us in appeal, we are against the appellant, for it is clear, both from the Mahomedan law and the current of decisions, that deferred dower can be demanded

(1) 1 Hay's Rep., 378.

(2) 4 Bom. H. C. Rep., A. C. J., 39.

only when the marriage is dissolved, either by divorce or by the death of the husband. If, however, the wife does demand this dower during the period of coverture, her claim can only be treated as premature; for such demand and refusal on the part of the husband do not give her any immediate cause of action, from which the period of limitation is to be counted, for her cause of action for deferred dower can, under no circumstances, arise during the continuance of the marriage.

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HOBHOUSE, J.—I agree in the judgment of Mr. Justice Loch. I think the suit for that part of the dower which is prompt, is barred by the application of the Statute of Limitations, clause 9, section 1, Act XIV of 1859. I observe that, by the preamble to that Act, it is provided that all suits shall be governed by the periods of limitation declared by that Act, any law to the contrary notwithstanding.

Then this suit is admittedly a suit on a written contract not registered; and by clause 9, section 1 of the Act, it is provided that to such suits the period of limitation applicable shall be three years from the date of the breach of contract.

Now here the breach of contract seems to me clearly to have occurred either at the time of the marriage, or at the latest when the plaintiff demanded, and her late husband refused to pay the dower claimed on the contract. That was in 1861, and the suit was not instituted until 1868, and so was not in time for the prompt dower.

[APPELLATE CRIMINAL].

1870
April 23.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

THE QUEEN v. CHANDRA SEKHAR ROY.*

Contempt of Court—Penal Code (Act XLV of 1860), s. 174—Code of Criminal Procedure (Act XXV of 1861), s. 171—Power of Subordinate Magistrate.

A Subordinate Magistrate has no power to try an offence punishable under section 174 of the Penal Code committed against his own Court, but is bound, under section 171 of the Code of Criminal Procedure, to send the case, if in his opinion there is a sufficient ground, for investigation to a Magistrate having power to try or commit for trial.

Baijoo Baul v. Gugun Misser and The Queen v. Gugun Misser (1) overruled.

THE following point was referred, for the opinion of the High Court, by the Officiating Sessions Judge of East Burdwan, to whom it had been referred by the Magistrate:—

A Subordinate Magistrate, not in charge of a sub-division, and not empowered under Act X of 1854 to receive complaints without reference from the Magistrate of the district, summons certain witnesses in a case which has been made over to him. The witnesses, notwithstanding that they have received the summons, fail to appear. Can the Subordinate Magistrate, under section 171 of the Code of Criminal Procedure, proceed, without reference to the Magistrate of the district, to summon and try these witnesses on a charge of having committed an offence under section 174 of the Penal Code; or must he make over the case to some Magistrate who (if not the Magistrate of the district himself) has power to try such cases, without reference from the Magistrate of the district?

The Magistrate in referring the point said:—"The only two High Court Rulings in this point that I can find are "*Baijoo Baul v. Gugun Misser* (1) and *Queen v. Tajumaddi Lahori* (2). In the former of these rulings it is laid down

* Reference, under section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of East Burdwan, under his letter No. 26, dated the 26th March 1870.

(1) 8 W. R., Cr. R., 61.

(2) 1 B. L. R., A. Cr., 1.

“that, as section 171 authorizes a Magistrate to send such case to a Magistrate having jurisdiction, he may of course send the case to himself; but I understand this to mean that he can send the case to himself, only if he has jurisdiction to try it. There is nothing in the ruling quoted to show whether the Deputy Magistrate alluded to was or was not in charge of a sub-division, and specially empowered under Act X of 1859. In the second ruling it was laid down that the Deputy Magistrate having referred the case of contempt to the Magistrate of the district, the Magistrate of the district could not refer the case back to the Deputy Magistrate for trial, but must try it himself. If this latter ruling be correct, it surely is inconsistent that a Subordinate Magistrate should have power on his own motion to take up a case, which the Magistrate of the district has no power to refer to him. Lastly, I do not think it was ever the intention of the Legislature to confer on an inexperienced officer (say one who has only just arrived in the country) the power of taking up cases of contempt against his own Court and punishing the accused without the knowledge of the Magistrate of the district.”

The Judge in his reference to the High Court said:—“I do not agree with the Magistrate. I think that the Assistant Magistrate is empowered to enforce his authority in his own Court, and punish, under section 174 of the Indian Penal Code, any one who, being legally bound to appear under a summons or subpoena, intentionally omits to attend. In the Schedule to Act VIII of 1869 any Magistrate is authorized to try such cases. I consider that the ruling in *Baijoo Baul v. Gugun Misser* (1) confirms above expressed opinion. The other ruling referred to by the Magistrate of *Queen v. Tajumaddi Lahori* (2) does not in my judgment apply to this case.”

The following opinion of the High Court was delivered by JACKSON, J.—“It appears to me that the opinion expressed by the Magistrate in making this reference is correct, and that the Assistant Magistrate against whose Court an offence punishable under section 174 of the Indian Penal Code was committed, was

(1) 8 W. R., Cr. R., 61.

(2) 1 B. L. R. A. Cr., 7.

1870 not competent to take cognizance of that offence, but was bound, under section 171 of the Code of Criminal Procedure, if he was of opinion that there was sufficient ground for investigating such charges, to send the case for investigation to a Magistrate having power to try or commit for trial ; and it seems to me that the section just mentioned clearly contemplates the sending of such case before a Magistrate, not being the Magistrate against whose Court the offence was committed.

It is, undoubtedly, true that, in *Bajoo Baul v. Gugun Misser* (1), I held a different opinion ; but, on reconsidering the matter, I think that that opinion was incorrect ; and having consulted Mr. Justice Hobhouse, who was the Judge sitting with me on that occasion, I have his authority for saying that he concurs with me in overruling that case. It appears to me, now, that the provisions of section 171 recognize the general principle that no one should be a judge in a case in which he is himself interested. The only exceptions to that rule which are allowed, are to be found in section 163, where, from the necessity of the case, a Court, civil, criminal, or revenue, is empowered to take immediate and summary notice of offences of certain descriptions committed in view, or in the presence of the Court itself ; and in section 172, where the Court of Session is empowered "to charge a person for any such offence," that is, offences of the kind specified in sections 168, 169, and 170 "committed before it, or under its cognizance," the offence "be triable by the Court of Session exclusively, and to commit "or hold to bail and try such person upon its own charge," probably the exception in favor of the Court of Sessions is based on the fact that that Court either acts with the aid of Assessors or tries by Jury.

The case of *Queen v. Tajumaddi Lahori* (2) has been referred to. It appears to me that there has been some misconception as to the ground on which that case was decided. I do not, therefore, refer to it as an authority ; but for the reasons just stated, I am of opinion that the Assistant Magistrate was not competent himself to deal with the case, but he ought to have sent it for trial before another Magistrate.

(1) 8 W. R., Cr. R., 61.

(2) 1 B. L. R., A. Cr., 1.

[ORIGINAL CIVIL.]

Before Sir Barnes Peacock, Kt., C. J., and Mr. Justice Macpherson.

**CHANDRAKANT MOOKERJEE (APPELLANT) v. KARTIK-
CHARAN CHAILE AND ANOTHER (RESPONDENTS).**

1870
Jan. 12.

Stamp—Promissory Note.

A. B., by an instrument in writing, dated 6th August, promised to pay C. D. "on demand," rupees 4,310-12-3. In the margin of the instrument was written "due 30th August," and annexed to A. B.'s signature, was the following memo.:—"The sum of rupees 4,310-12-6 only; forty-five days from the 5th of August." Held that the instrument was properly stamped as a promissory note payable on demand, and ought to have been admitted in evidence.

Per Peacock, C. J.—A promissory note payable on demand ought to be stamped as such, notwithstanding there may be a collateral agreement between the parties that the holder will not present it for a given time, or if paid on demand that the (maker) shall be entitled to discount.

This was an appeal from the decision of Mr. Justice Phear refusing to admit a document as evidence, on the ground of its being insufficiently stamped.

The document in question was as follows:—

"Calcutta, 6th August 1868.

Chit No. 3114.

Contract No. 1087, dated 23rd May 1868.

Rs. 4,310-12-3.

On demand, we Kartik Chaile and Kedarnath Dey, promise to pay to Messrs Watson, Green, and Hart, or order, the sum of rupees four thousand three hundred and ten, annas thirteen, and pie three only, with interest, at the rate of 12 per cent. per annum, from 30th August 1868, being the value of the goods delivered by them to us, viz., ex *City of Benares*, C. W. J. G. H., 210, 209, 200, 198, 207, 199, 208, 211, 220, 212, 215, 217; twelve bales Mule Twist, No. 40, 12,000 morahs, at 6 annas per morah.

In the margin.

No. 5154.

Due, 30th August.

Chit No. 3114.

Sale No. 1087.

Date, 6th August 1868.

Account of Kartik Chaile and Kedarnath Dey.

1870	The price of 12 bales of Twist Twine, No. 40, consisting of			
CHANDRAKANT	2,000 morahs at 6 annas	...	...	4,500 0 0
MOOKERJEE	Allowance at 3 pice per morah	...	...	187 8 0
v.				
KARTIK-				
CHARAN				
CHAIL.				
	Less deduction	...	...	Rs. 4,312 8 0
				1 10 9
				Rs. 4,310 13 3

SRI KARTIKCHARAN CHAIL,

SRI KEDARNATH DEY,

by

SRI MADAB CHANDRA DUTT.

The sum of four thousand three hundred and ten rupees, twelve annas, and six pice only;—forty-five days from the 5th August.

(On bank).

Paid on the 7th September, through B. N. Mookerjee, company's rupees 1,000."

This was stamped with ~~one-anna stamp~~, as a note payable on demand. The objection was taken, and allowed by PHEAR, J., that it was inadmissible as evidence, by reason of its not being properly stamped, it being on the face of it a note payable not on demand, but forty-five days after sight. PHEAR, J., also refused to admit it as an agreement, on the stamp penalty being paid.

Mr. Graham (with him Mr. Jackson), for the appellant, contended that the note was, on the face of it, a note payable on demand. The evidence in the case also showed it to be a note payable on demand, but subject to discount, if paid before forty-five days had expired, and bearing interest if paid afterwards. Further, that the words at the latter part of the note were no part of the note itself, but merely referred to a collateral condition.

Mr. Kennedy (with him Mr. Bollerjee), for the respondent, contended that the words at the end of the note were a part of the note itself, and showed clearly that the instrument was never intended to be a note payable on demand. The *Eastern Financial Association v. Pestonji, Cursetji, Sheriff* (1) [PEACOCK, C. J., referred to *Fanshawe v. Peet* (2)], If the note had been sued upon before the expiration of forty-five days, the

(1) 3 Bom. H. C. Rep., 9

(2) 2 H. & N. 4.

Court would not have enforced payment, but would have incorporated the qualification which appeared on the face of the note. [PEACOCK, C. J.—The qualification may refer not to what is written in the body of the note, but to what is written in the margin]. I contend that which is written in the margin should be incorporated in the body of the note. The note is not evidence of an account stated—*Green v. Davies* (1)—and the document is clearly not an agreement under the terms of the Stamp Act X of 1862. The evidence shows that it was an attempt to avoid the stamp law, and for this reason the Court would not allow it to be stamped even if the 22nd section of the Stamp Act, which prohibits the stamping of an instrument at the time of trial, did not exist.

Mr. Graham was not called on to reply.

PEACOCK, C. J.—It appears to me that the note in question ought to have been admitted in evidence, and should not have been excluded on the ground of not being sufficiently stamped. It appears to me that, in applying the Stamp Law, the stamp must be paid upon what is stated in the instrument, and cannot depend upon collateral evidence. If a man signs a promissory note payable on demand, it appears to me that the note ought to be stamped as a note payable on demand, although there may be a collateral agreement between the parties that the holder of the note will not present it for a given time; or, if paid on demand that the maker of the note shall be entitled to a certain amount of discount to be deducted. In the present case, according to the evidence, notes payable on demand were given in respect of all the other goods which were sold. The note in question expressly declares that the defendants, on demand promise to pay to Messrs. Watson, Green, and Hart, or order, the sum of Rs. 4,315-13-3, with interest, at the rate of 12 per cent. per annum, from the 30th August 1868. In the margin of the note it is stated that something will be due on the 30th August, according to Chitty No. 3113, and contract of Sale No. 1087. It appears probable that the sum mentioned at the foot of the signature

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(1) 4 B. & C., 235, 242.

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was intended to correct that mistake, and to point out that, according to the real transaction between the parties, what may be called the price of the goods was not to be due on the 30th August, i. e., was payable without any deduction for discount.

There may be a partial or varying acceptance of a bill of exchange, but there is a great distinction between a bill of exchange and a promissory note. A bill of exchange is a request, by one man to another, to pay a certain amount, and the acceptor of the bill may, according to the custom of merchants, accept only for part of the amount which he is requested to pay, or he may accept, payable at a different time from that at which he is requested to pay. And that seems consistent with reason, but when a man signs a promissory note, all that he promises to do is at his own discretion. He is not varying that which another man requests him to do. He cannot, therefore, with any reason, state in the body of the note that he will do one thing, and by a memorandum annexed to his signature declare that he intends to do another thing. In this case the defendants expressly promised to pay, on demand, a certain sum of money, but to their signature they annexed the following words: "The sum of four thousand three hundred and ten rupees, twelve annas, and six pie only" (which is a different sum from that stated in the body of the note), and "forty-five days from the 5th of August" (which is also a different date from that stated in the body of the note). They do not say that they intend that the note should be payable forty-five days after date for the sum of rupees 4,310-12-6 and they do not say:—"Although we stated one thing in the body of the note, we intend to state a different thing in the memorandum annexed to the signatures." The memorandum annexed to the signatures is, therefore, ambiguous, to say the least of it and may refer merely to the memorandum in the margin which specifies the contract under which the note was given.

In the case of *Fanshawe v. Peet* (1), to which I referred in the course of the argument, Mr. Baron Martin said that, "at the trial, after consulting my brother Crompton, I thought that, "if a drawee intends to qualify his acceptance, he must do so in

"unambiguous language." The present case is still stronger, being the case of a promissory note. If the defendants by their signature intend to say that what they promise to do is to pay the amount annexed to their signature at the date mentioned in the memorandum, and that they are not bound by the terms in the body of the note, it follows that they ought to do so in the most unambiguous language. In this case I have shown that the memorandum at the end of the signature does not, in unambiguous language, state that the maker is not to be bound by what he has expressly declared in the body of the note which he has signed.

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In the case of *Ferris v. Bond* (1), it was held that a note beginning in the body of it "I, A. B., promise to pay," and signed "A. B. or else C. D.," was a good note against A. B.; in other words, that the body of the note prevailed over the signature; consequently that it was not a note which in fact would be bad, that either A. B. or else C. D. was to be bound by it. It was held that the words "or else C. D." was only evidence against C. D. of a conditional agreement to pay, if A. B. did not.

In this case, I think, we may fairly and reasonably hold that the words annexed to the signature were not sufficiently clear to show that the signer of the note intended to do that by his signature which was expressly at variance with what he was stated to have promised in the body of the instrument.

I think that the Court is bound to put a reasonable construction upon documents in cases like this, and not to allow a man to use ambiguous language, for the purpose of getting rid of a contract upon the ground that it was not sufficiently stamped. It would indeed be very hard upon parties, if a law, which was made simply for the purpose of the revenue, should be so applied as to allow men to make contracts, and then to violate them. It appears to me that the decree ought to be amended, by adding to the amount of the decree the amount due upon this note, with interest thereon, at 12 per cent. per annum, from the 1st October 1888. The appellant to have his costs on scale No. 2.

MR. JUSTICE PHILLIPS.—I admit that if it had been clear from the words added by the person who signed the note, that his inten-

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tion was that the note was not to be payable on demand, there would have been no promissory note at all. But I think it is extremely doubtful what was the real object in adding those words. Mr. Kennedy has contended that the way to read the note is by treating it as a note payable "at forty-five days' sight, on demand," or "on demand, after forty-five days,"—a reading absolutely inconsistent with the terms of the note as it originally stood. But it appears to me more probable that the intention was merely to show that interest was not to begin to run until after the lapse of forty-five days, or that if the money was paid before the lapse of forty-five days, discount was to be allowed. We have the evidence of the person who signed the note, and it appears that he himself did not know the meaning of the words which he added. Madab Chandra Dutt says, "I was servant of K. C. Chaile and Kedarnath Dey. I signed the promissory notes. I was servant of the firm from its commencement. I was the Gomastah. I was Gomastah to K. C. Chaile and Kedarnath Dey. I was Gomastah of the business of K. C. Chaile and Kedarnath Dey. Gadadhar Dey used to work. The business of K. C. Chaile and Kedarnath Dey used to be carried on by Gadadhar Dey. Gadadhar carried it on. This is signed by me. I was in the habit of signing promissory notes. Gadadhar told me to do so. I signed the two names to this by authority of Gadadhar Dey." Then, in answer to Mr. Kennedy, he says, "I wrote 'forty-five days from 5th August.' Gadadhar told me to do so. Gadadhar told me; I don't know the meaning of it. Gadadhar told me, and I wrote it. I know nothing about its meaning." On further examination by Mr. Kennedy, he says, "I know the goods used to be purchased, and delivery taken. The terms were, money was to be paid forty-five days after the goods were brought; always forty-five days after delivery. The note was signed on the goods being delivered. After the goods were delivered, the notes were brought to me, and I signed them. Money has been paid within the term, and discount allowed; and money has been paid after the term. If money was paid within forty-five days, discount was allowed. That was what I was told to write, and I wrote it. I wrote according to my directions."

So that, in the first place, he says he does not know what he meant; and in the second place he says that he meant that which is entirely opposed to what Mr. Kennedy contends that he may have meant. In my opinion there is nothing to lead me to suppose that he intended to alter the note from being a note payable "on demand" to a note which was not payable on demand. Therefore, I think the note is sufficiently stamped, and ought to have been admitted in evidence.

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Attorneys for appellants : Messrs. *Hatch and Hoyle*

Attorneys for respondents : Messrs *Judge and Gangooly.*

Before Mr. Justice Macpherson.

ABBOTT v. CRUMP,

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Feb. 3.

Partnership, Dissolution of—Adultery of Partner with Wife of Co-partner

Adultery of one partner with the wife of his co-partner, is a sufficient ground for dissolution of the partnership.

THIS was a suit for dissolution of partnership, for an account, for the appointment of a receiver, and for an injunction to restrain the defendant from dealing in any way with the co-partnership business and effects.

The plaintiff and defendant entered into partnership, as chemists and druggists under the name of Crump, Abbott, and Co., by articles of agreement dated the 10th September 1864, the partnership to continue for eight years from that date. This agreement was revoked by other articles of agreement dated the 13th of December, 1867, under which they entered into a fresh partnership for the remainder of the eight years, it being agreed that the defendant should have a $\frac{1}{3}$ rd share and the plaintiff a $\frac{1}{3}$ rd share in the business. It was provided that the plaintiff should devote his time and attention to the business so that it should fully compensate for the share he took, and that the defendant should display such interest in the business as lay in his power, without detriment to his other prospects in life. It was also provided that the defendant should live and reside at his option in the upper floor

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of the business premises, and that the plaintiff should live with him, but should remove at the request in writing of the defendant. The plaintiff, on or about the 12th July 1869, discovered that the defendant was carrying on an adulterous intercourse with his wife, and thereupon wrote to the defendant through his attorneys asking that the partnership should be dissolved. Negotiations were entered into between the partners for this purpose, but they were afterwards broken off. On the 29th of July 1869, the plaintiff filed a petition for a dissolution of his marriage on the ground of his wife's adultery with the defendant, and a decree *nisi* for dissolution of his marriage was made on the 20th December 1869. The material question in the case was whether the defendant's having committed adultery with plaintiff's wife was sufficient ground for a dissolution of partnership.

Mr. *Marindin* (with him Mr. *Hyde*) for the plaintiff, contended that though adultery committed by one of the partners, "even of a most disgraceful and profligate description" with another man's wife, might be no ground for dissolving the partnership,—*Snow v. Milford* (1),—adultery by one partner, with the wife of his co-partner, was a sufficient ground for decreeing a dissolution of the partnership.

The defendant in person *contra*.

MACPHERSON, J.—In this case the first question is whether the fact of the defendant having committed adultery with the wife of the plaintiff, is a sufficient ground for the dissolution of their partnership. I readily admit that immorality generally is not a ground, and also that the mere fact of one partner committing adultery with other than the wife of another partner is no ground, but anything which makes it practically impossible for parties to join in the work of their partnership is a ground for dissolution, and it is one of the first principles that it should be so. Adultery has been proved, and a decree for dissolution of marriage made under such circumstances that it is absolutely impossible for the plaintiff to carry on

(1) L. R. 3 Weekly Notes, M. R., 62.

any business with the defendant. I have no doubt whatever that adultery with a partner's wife is a sufficient ground for dissolution of the partnership; other facts such as exclusion from the shop have been alleged. For myself I rest my decision on the adultery.

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Attorneys for the plaintiff: Messrs *Robertson, Orr, Harris,*
and *Francis*.

Attorneys for the defendants: Mr. *R. M. Thomas*.

Before Mr. Justice Norman, Off. Chief Justice and Mr. Justice Markby
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AMRIT SING, NARAYAN SING, v. MADHAB CHANDRA RUDAR
AND OTHERS.

*Contract—Sale of Goods—Addition of "Fresh Goods"—Reference to High
Court—Act XXVI of 1864, s. 7.*

R. G. G. and Co. entered into a contract to sell certain goods to A. S., N. S., both Calcutta firms. The contract, which was in a printed English form, was taken on the 18th December 1868 by one M., on behalf of the firm of R. G. G. and Co., to obtain the signature of the vendees' firm. It was signed on their behalf by A. S. Neither M. nor A. S. understood English, and no explanation was given of the terms of the contract to A. S. at the time he signed it, but there had been negotiations between M. and A. S. as to these goods prior to the time when A. S.'s signature was obtained. It did not appear that the goods had been identified in any way by the purchasers who had merely seen a sample. After his signature, A. S. wrote in Nagri "goods fresh, grenadines five cases, at 2 annas 3 pie per yard." A. S., N. S., afterwards, on the 9th February 1869, paid rupees 1,000 as earnest-money, which was accepted by R. G. G. and Co., who then allowed further time for taking delivery of the goods, which, however, A. S., N. S., finding some of the goods were stained, declined to do. R. G. G. and Co., thereupon brought an action for breach of contract in not taking delivery, and a cross-suit was brought by A. S., N. S. to recover the rupees 1,000 paid as earnest-money.

Held, that the words "fresh goods" after the signature of A. S. constituted part of the contract into which the parties entered, and by which they were bound.

Where a case has been heard by a single Judge of the Small Cause Court, and a new trial has been applied for, and the case has been re-heard by two Judges, the Court is bound, under section 7, Act XXVI of 1864, to refer the case for the opinion of the High Court, if requested to do so by either party to the suit, though the Judges do not to entertain any doubt or differ in opinion.

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THIS was a case submitted, for the opinion of the High Court, by the first and second Judges of the Calcutta Small Cause Court under section 7 of Act XXVI of 1864.

The facts were thus stated in the reference :—"These two cross-actions were heard separately before the first Judge of this Court, and decided on the 7th April and 5th June 1869, respectively. New trials were applied for in both, and allowed on the 28th August 1869.

"On the new trial by consent of parties, the two cases were heard together.

"In these cross-actions, R. G. Ghose and Co. are claiming from Narayan Sing, Amrit Sing, damages arising from the latter not having taken delivery of certain specific goods, in accordance with the terms of an alleged contract, while Narayan Sing, Amrit Sing, claim a refund of a certain sum paid by them as earnest-money on account of a contract which they allege that R. G. Ghose and Co. have failed to perform.

"The pleas recorded in behalf of Narayan Sing, Amrit Sing, were :—

"1st.—Non-assumpsit.

"2nd.—That R. G. Ghose and Co. were not ready and willing to deliver such goods as they were bound to deliver according to contract.

"3rd.—Damages excessive.

"The facts established before us were the following :—

"On the 18th December 1868, Matilal, the nephew of the broker of R. G. Ghose and Co., having received from his uncle the contract in a printed English form, took it to the shop of Narayan Sing, Amrit Sing, and got it signed by Amrit Sing in the name of his firm.

"Neither Matilal nor Amrit Sing understood English, and no explanation of the terms of the printed document was given to Amrit Sing by Matilal, except in so far as Amrit Sing was informed that it related to the sale of five cases of grenadines, at 2 annas 3 pie per yard, to be paid for on delivery, which was to be taken within three days.

"Below his signature, Amrit Sing wrote in Nagri 'goods fresh, grenadines five cases, at 2 annas 3 pie per yard.' There had been

negotiations between Matilal and Amrit Sing as to the price to be paid for the goods prior to the date when Amrit Sing's signature was obtained, but it did not appear that either Amrit Sing or Narayan Sing had seen or identified the goods which they agreed to buy; they allege that they had merely been shown a sample. Delivery was not taken by Narayan Sing, Amrit Sing.

"It appeared that one of the five cases which R. G. Ghose and Co. allege to have been bought by Narayan Sing, Amrit Sing, on the 18th December 1868, had been opened by R. G. Ghose and Co., and had been sent by them to Cohn, Feilmann's auction-rooms on the 14th November 1868, in order that the state of the market, with respect to the description of goods, might be ascertained. It further appeared that this case had been put up to sale by Cohn, Feilmann twice every week, from the 14th November 1868, down to the 4th February 1869; on which latter date the case was actually sold, subject to the approval by R. G. Ghose and Co. of the price offered; it would seem that this sale was subsequently cancelled.

"On the 8th February 1869, four other cases of grenadines were sent to Cohn, Feilmann by R. G. Ghose and Co., with directions that these, along with the case sent on the 14th November 1868, should be sold on the account and at the risk of Narayan Sing, Amrit Sing.

"On the 9th February 1869, Narayan Sing went to R. G. Ghose and Co., asking for further time, and tendered a sum of rupees 1,000 as earnest-money, which R. G. Ghose and Co. received. The following words were then written in English on the margin of the English printed form:—

"Calcutta, 9th February 1869.

"Paid earnest-money on deposit rupees 1,000. The goods to be cleared within 15 days from date."

"This memorandum was signed in Nagri by Narayan Sing, who stated that he could not read or write English. It did not appear that he could, or that any explanation of the terms of the English contract was given to him at the time when he signed the marginal memorandum.

"On the same day, 9th February 1869, R. G. Ghose and Co.

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directed Cohn, Feilmann to stay the sale of the five cases which had been sent to their auction-rooms.

"On the 24th February, Narayan Sing, Amrit Sing, sent their gomasta to R. G. Ghose and Co., to ask for delivery of five cases of grenadines; the gomasta was told he would get delivery from the godowns of Cohn, Feilmann, and went there for delivery. On inspection of the case which had been sent to Cohn, Feilmann in November 1868, it was found that more than half the pieces were stained.

"Narayan Sing, Amrit Sing, declined to take delivery on the ground that the goods were not fresh goods.

"R. G. Ghose and Co. caused the goods to be surveyed; and in accordance with the recommendation of the surveyors, offered an allowance or deduction from the price of the goods contained in the opened case. This arrangement Narayan Sing, Amrit Sing, declined to accept.

"On the 16th March 1869, the goods were sold by public auction, and realized rupees 1,705, less than the sum which had been originally fixed as their price.

"At the hearing of the new trials, R. G. Ghose and Co. contended that Narayan Sing, Amrit Sing, are bound by the terms of the printed and written English part of the contract signed by Amrit Sing on the 18th December 1868, and that the Nagri writing, then added by him when the document was tendered to him for signature, does not alter the effect of the conditions to which he then subscribed.

"They contend further that, if the condition of 'fresh goods' inserted by Amrit Sing be read as a part of the contract between the parties, the contract thus altered has not been carried out by Narayan Sing, Amrit Sing, and that they, R. G. Ghose and Co., are still entitled to recover as on a breach thereof.

"They also contended that if the contract, as made on the 18th December, was not a binding contract between the parties, it became so on the 9th February, when Narayan Sing paid earnest-money on account of it, and was allowed further time for taking delivery of the goods.

"On a careful consideration of the facts and arguments in these cases, we were of opinion :—

“ 1st.—That no binding contract was entered into by the parties on the 18th December 1868, inasmuch as the terms of the English document to which Amrit Sing then attached his name, were not explained to or understood by him, and are inconsistent with the Nagri writing which he appended to his signature; the English contract writing indicating a sale of specific goods the Nagri writing indicating a sale of goods which had not been identified, but which were to answer to the character of fresh.

“ 2nd.—That there was no sufficient evidence that, on the 9th February 1869, Narayan Sing had agreed to or ratified the terms contained in the English contract writing; it being reasonable to believe that the extension of time for which he then applied had reference to the terms of the Nagri writing which he understood to contain the contract by which he was bound, and not to the terms of the English writing which he did not understand, and which were not explained to him.

“ On the whole case we were of opinion that, as R. G. Ghose and Co. understood themselves to be selling specific goods, and as Narayan Sing, Amrit Sing, understood themselves to be purchasing, not specific goods, but goods which had not been identified, and which were to answer to the description of fresh goods, there was not present throughout the entire transaction that element of consent in regard to the subject-matter of the contract which is essential to a valid contract. On that view we held that the claim of R. G. Ghose and Co. must be dismissed, and that the claim of Narayan Sing, Amrit Sing, for the refund of the amount paid by them on the 9th February should be decreed.

“ We were requested by the attorney for R. G. Ghose and Co., to deliver our judgment in this Court, contingent upon the opinion of the Judges of the High Court on the four questions referred.

“ We are inclined to think that it was not the intention of the Legislature that, when a cause has been heard by a single Judge, and a new trial has been applied for, and the case has been re-heard by two Judges, it should then be open to the parties to require that a reference should be made to the High Court on points on which the two Judges do not differ, and on which a reference might have been asked for at the time when the case was origin-

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ally heard, or at the time when the new trial was applied for. We do not think that it was meant that a party should have two remedies ; the remedy by an application for a new trial, also the remedy by reference to the High Court. But as there may be doubt on this point, we refer it for the opinion of the High Court, and have delivered our judgment contingently on such opinion.

“ The following was the form of the contract :—

Calcutta, 18th December 1868.

The undersigned do hereby acknowledge to have purchased of Messrs. R. G. Ghose & Co., merchants in Calcutta, the undermentioned :—

Per Wayferer, five Cases Grenadines.

S. T. }	6051	100 Pieces	6,182½ Yds.
L. }			
„	6052	100 „	6,062½ „
„	6057	100 „	6,107½ „
„	6058	100 „	6,135½ „
„	6059	103 „	6,238½ „

At As. 2-3 per Yd.

30,676½ Yds.

Terms cash on delivery, subject to no discount, @——per cent. per annum.

Conditions.—Delivery to be taken from their godowns, and paid for on the 21st instant ; and in the event of remaining uncleared upon the expiration of that time, interest to be charged on the purchase-money due at the rate of —— per cent. per annum. The deposit of rupees —— now made to be forfeited, and the goods to be re-sold, either by public or private sale, on our account of any loss thereon.

We engaging to make good, besides forfeiting deposit and all claim whatever to any advantage which may arise from such re-sale, and should the above goods or any part thereof remain uncleared after the day.

Although the price should have been paid, we shall have no claim for damage, short delivery, or any other defect ; this we declare to be a special condition of agreement.

We further agree with the said Messrs. R. G. Ghose and Co. who are British subjects, that if any differences arise concerning the above purchase or this agreement, the same may be determined by the High

Court of Calcutta, to the jurisdiction whereof we hereby waive all pleas and objections.

(*In Nagri*). Signature of Narayan Sing, Amrit Sing.

(*In Nagri*). Goods, fresh grenadines, five cases, at 2 annas 3 pie per yard.

"The following were the questions referred :—

"1. Does the addition of the words 'fresh goods' after the signature affect the contract, and how ?

"2. Did what took place on the 9th of February affect any of the terms of the contract, and did it operate as a waiver of any prior breaches by Narayan Sing, Amrit Sing ?

"3. Does the statement of facts and argument put in by the attorney of Narayan Sing, Amrit Sing, before judgment was given in the original case of *Rooder and others v. Narayan Sing, Amrit Sing*, preclude Narayan Sing, Amrit Sing, from setting up a contradictory case to that set up in such statement in both or either of these new trial cases.

"4. Whether, on the facts of the case, the Judges of the Small Cause Court were right in law in determining both or either of these cases against the partners in the firm of Messrs. R. G. Ghose and Co. ?"

Mr. Woodroffe for R. G. Ghose and Co., referred to the case of *Robertson, Gladstone, and Co., v. Kastarey Mull* (1).

No one appeared for Amrit Sing, Narayan Sing (2).

The opinion of the High Court was delivered by

NORMAN, J.—Madhab Chandra Rudar and others carrying on business as merchants in partnership, under the name of Ramgopal Ghose and Company, brought a suit against Narayan Sing and Amrit Sing for damages for not taking delivery of five

(1) 3 B. L. R., O. C., 106.

(2) It afterwards appeared that there had been some error in the service of the notice of hearing on Amrit Sing, Narayan Sing; and, on the application of Mr. Branson, a *rule nisi* was granted calling on R. G. Ghose and Co., to show cause why the case should not be re-heard,

The rule was made absolute on the 24th March; and on the 31st March, the case was accordingly re-heard, Mr. Evans appearing for R. G. Ghose and Co., and Mr. Branson appearing for Amrit Sing, Narayan Sing; but the Court (NORMAN and MARKEY, JJ.) saw no reason to change their opinions.

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cases of grenadines sold by Ramgopal Ghose and Company to them on the 8th of December 1868, of which delivery was to be taken on the 21st of that month. The defendants, Narayan Sing, Amrit Sing, not having taken delivery within the time limited, were called upon to do so, upon which they went to Ramgopal Ghose and Company, asking for time, and paid a sum of rupees 1,000 as earnest-money ; and the following entry was made on the margin of the written contract :—

“ Calcutta, the 9th February 1869.

“ Paid earnest money on deposit rupees one thousand. Goods to be cleared 15 days from this date.”

Delivery not having been taken, the goods were ultimately sold by Messrs. Cohn, Feilmann, and Company, and realized rupees 1,705 less than the contract. Ramgopal Ghose and Company brought this action to recover that sum, less the rupees 1,000 which they had received on the 9th February 1869. Narayan Sing, Amrit Sing, brought a cross-action against Ramgopal Ghose and Company to recover the sum of rupees 1,000 which had been paid by them as earnest-money on the 9th of February apparently as money received to their use, on the ground that it had been paid without any consideration.

Now the main point which arises upon the several questions which have been submitted to us by the Judges of the Small Cause Court is whether, in the case before us, there was any valid binding contract between the parties. The contract is in the following terms :—

“ The undersigned do hereby acknowledge to have purchased “ of Messrs Ramgopal Ghose and Company, the undermention- “ ed, per *Wayfarer*, five cases grenadines” (then come the marks and numbers of the several cases and particulars of their contents), “ at 2 annas 3 pie per yard;” and after the printed conditions, there is at the foot the signature of Amrit Sing, written in Nagri. The signature is as follows :—

“ Narayan Sing, Amrit Sing.”

“ Goods, fresh grenadines, five cases, at 2 annas 3 pie per yard.”

It was in evidence that Amrit Sing, the person who signed

the English contracts, did not understand and could not read English ; but it is not found, and we see no reason to suppose, that he did not understand the contract that he was entering into in signing the English printed form of contract, specifying the cases by their marks and numbers. In our opinion, it is clear that the contract between the parties, evidenced by the signing of the English paper, consisted not only of the English writing, but of the terms " goods, fresh grenadines," written in Nagri by Amrit Sing. If that contract was accepted after the writing of these words, and we think it clear that it was accepted by Ramgopal Ghose and Company, that written document, including the Nagri words, was the contract by which Amrit Sing who signed it, and Messrs. Ramgopal Ghose and Company, who accepted it, were bound. "

We think that there is no inconsistency whatever in adding to a contract for specific cases of goods a stipulation or warranty that the goods are to be fresh goods. We think, therefore, in answer to the first question put to us by the Judges of the Court of Small Causes, that the words " fresh goods" after the signature constituted part of the contract.

To the 2nd question which had been put to us, whether what took place on the 9th of February, viz., the payment of the rupees 1,000 by Narayan Sing, Amrit Sing, affected any of the terms of the contract, and operated as a waiver by Narayan Sing, Amrit Sing, of any prior breaches. We think there is nothing to show that, in paying the rupees 1,000 on account of the contract, and thereby obtaining further time to take delivery, Narayan Sing, Amrit Sing, intended in any way to preclude themselves from taking any objection that the goods did not answer the warranty. The result would be that, as regards the suit for damages of Ramogpal Ghose and Company against Narayan Sing, Amrit Sing, we think that, on the findings of the Judges of the Small Cause Court, we must take it as proved that there was a contract by Narayan Sing, Amrit Sing, to accept the five cases mentioned in the contract of the 18th of December 1868, Ramgopal Ghose and Company warranting them to be fresh goods. In order to determine whether Ramgopal Ghose and Company are entitled to any and what damages for the non-acceptance of these goods by Narayan

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Sing, Amrit Sing, within 15 days after the 9th of February, the issue should have been tried, whether the goods were fresh goods ; and but for the consent of Mr. Woodroffe, the counsel for Ramgopal Ghose and Company, we must have remanded the case, for trial of that issue.

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In answer to the 3rd question, we do not think that anything contained in the written statement put in by Mr. Carapiet precluded Narayan Sing, Amrit Sing, from insisting on their right to have that issue tried.

I have now to come to the cross cause of Narayan Sing against Ramgopal Ghose and Company.

The 4th question put to us by the Judges of the Small Cause Court is whether, on the facts of the case, they were right in law in determining both or either of the cases against the partners of Messrs. Ramgopal Ghose and Company.

Now it will be seen, from what I have already said, that we think that the rupees 1,000 were paid by Narayan Sing, Amrit Sing, as a deposit upon an existing contract ; and in consideration of the agreement of Ramgopal Ghose, to give them further time to accept and pay for the goods under that contract. In the events that have happened, there is nothing to show that Narayan Sing, Amrit Sing, are entitled to a refund of any portion of that sum of rupees 1,000. There is nothing to show, for it has not been found or even tried, whether Ramgopal Ghose and Company, on the 21st December 1868, were able and ready and willing to deliver the five cases of grenadines from the *Wayfarer* in the condition in which they warranted to deliver them, viz. as fresh goods. Narayan Sing, Amrit Sing, have not therefore shown that they were not liable to pay the contract price for these goods ; or if they are entitled to any allowance, what is the amount of such allowance ; they have not shown that the moneys realized by Ramgopal Ghose and Company, by the sale of the goods, was more than sufficient to indemnify that firm from any loss by reason of the non-fulfilment of their contract to accept and pay for the goods. Therefore, on the finding of fact of the Judges of the Small Cause Court, it seems to me that the suit of Narayan Sing ought to have been dismissed. Messrs. Ramgopal Ghose and Company, through their counsel, Mr. Wood,

roffe, are satisfied with the dismissal of that suit, and do not ask for a remand in the case of Madhab Chandra Rudar against Narayan Sing, Amrit Sing.

The result will be that the decision of the Court of Small Causes dismissing this suit of Madhab Chandra Rudar against Narayan Sing, Amrit Sing, will stand. The decision of the Court of Small Causes in the cross cause of Narayan Sing, Amrit Sing, and Madhab Chandra Rudar and others, will be reversed, and that suit also will stand dismissed. Ramgopal Ghose and Company, we think, are entitled to the costs of reversing the question in this case, and stating the same and of the argument in this case. We order that it be referred to the Taxing Officer to tax these costs on scale No. 2. Each party will bear their own costs in the Court of Small Causes.

I will now advert to a preliminary question which was raised by the Judges of the Court of Small Causes. They say that in their opinion "it was not the intention of the Legislature that, when a case has been heard by a single Judge, and a new trial has been applied for, and the case has been re-heard by two Judges, it should then be open to the parties to require that a reference should be made to the High Court on points on which the two Judges do not differ, and on which a reference might have been asked for at the time when the case was originally heard, or at the time when the new trial was applied for."

The Judges say :—"We do not think that it was meant that a party should have two remedies ; the remedy by an application for a new trial, and also the remedy by a reference to the High Court. But as there may be doubt on this point, we refer it for the opinion of the High Court, and have delivered a judgment contingently on such opinion."

The cause being of an amount exceeding rupees 500, the question turns upon the construction of the 7th section of Act XXVI of 1864.

That section provides for three cases: firstly, as to any "question of law of equity, or any question as to the admission or rejection of any evidence as to which the Judges of the Court of Small Causes shall entertain any doubts;" secondly, "any question which they shall be requested by either party to the suit to

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“reserve for the opinion of the High Court;” thirdly, “where two judges sit together and differ in opinion.”

Now in each of such cases, the reference is imperative. The language is that “the Judges of the said Court of Small Causes *shall reserve*” such question. There is nothing whatever which confines the obligation of the Judges of the Court of Small Causes to refer cases to those cases in which the questions have been argued before a single Judge. It is quite plain that a question which has been determined by more than two Judges may be referred and must be referred, either if they be requested by the parties to the suit to refer it, or if they entertain any doubts as to their decision. Whether they are requested or not to make any reference, they are bound to state a question where only two Judges sit together if they differ in opinion. It would be exceedingly inconvenient if the rule were as suggested by the Judges of the Small Cause Court. It often happens that, on the first hearing before a single Judge, questions of fact are chiefly debated, and the question of law on which probably the liability of the unsuccessful party is to turn, is scarcely raised until the argument on a motion for a new trial after the facts have been ascertained.

Attorneys for R. G. Ghose and Co. : Messrs. *Stack and Co.*

Attorney for Amrit Sing, Narayan Singh : Mr. *Carapiet.*

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Sir C. P. Hobhouse, Bart.

CHATTAR LAL SING AND OTHERS (DEFENDANTS) v. SHEWUKRAM,
alias RAI DURGA PRASAD, AND ANOTHER (PLAINTIFFS) AND
 OTHERS (DEFENDANTS).*

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 March, 19.

Gift, Construction of —Absolute Gift—Petition to Collector for Mutation of Names.

A., a Hindu, living under the Mitakshara law, executed a petition to the Collector' stating that he was in possession of all his ancestral property; that his only son was dead; that he had no wife; that his son had left a widow, B., and two daughters and no other children or heirs; the petitioner went on to state, "I declare her (B.) my heir, and as with the exception of the said B., I have no other heir or *malik*, nor can there be any, of which circumstances I have already preferred information in my petition of 16th April 1830, and life is uncertain, I consequently request that the name of B., the widow of my late son, be registered in the Collectory mutation book as proprietor and *malguzar* in the place of my name with regard to the property" &c. "Further, as of B., there are two daughters who, after marriage, by the blessings of Providence, may be blessed with children; they and their children, therefore, are and will be heirs and *maliks*. But as long as I live, I shall keep the management of my own affairs in my own hands, and look after all the transactions of *dihat*, &c., myself, as heretofore." B. sold and conveyed parcels of the property. In a suit by her daughter's son against the purchasers, for a declaration of his reversionary right to the property sold, *held*, that under the terms of the petition, there was an absolute gift to B. That as the gift was not fettered by any restriction, the alienation by B., was good and valid.

See also
 14 B.L.R. 229.
 12 B.L. R. 11.

RAI KALIKAPRASAD died, during the life-time of his father, Rai Harnarayan, leaving a widow, Rani Dhan Kunwar, and two daughters, Bibi Sitabo and Bibi Dulari. Rai Harnarayan, after the death of his son, executed certain instruments or petitions in favor of Rani Dhan Kunwar, correct translations of which are set out in the judgment of Mr. Justice Hobhouse. Harnarayan died on the 16th Falgun 1242 F. S. (27th February 1835). Bibi Sitabo died without issue. Bibi Dulari died, leaving the plaintiff, her only son. Rani Dhan Kunwar had alienated certain properties covered by the said instruments. Hence the suit by the plaintiff, on the allegation that, under the terms of the said instruments, the plaintiff was the only reversioner, and that there was no legal necessity to justify the sale, He prayed for a can-

* Regular Appeals, No. 215, 237, 239, 245, 247, 255, 257, 259, 260, 264, and 273 of 1869, from the decrees of the Judge of Shahabad, dated the 6th August 1869.

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The defence set up was (*inter alia*) that the plaintiff was not the reversionary heir to the late Harnarayan, and that, under the instruments referred to in the plaint, Harnarayan made an absolute gift of all his property to Rani Dhan Kunwar, and that she had full power to alienate the same.

The Judge of Shahabad held (on the authority of *Giridharilal v. The Government of Bengal* (1) and *Amritakumari Debi v. Lakhinarayan Chuckerbutty* (2), that the plaintiff was, according to the Mitakshara, the reversionary heir of Harnarayan; that the instruments did not convey the property absolutely to Rani Dhan Kunwar, and that there was no legal necessity to justify the sale. He, accordingly, passed a decree declaring the plaintiff's future right as reversionary heir to the properties in dispute.

The defendants appealed to the High Court, upon the ground (*inter alia*) that the instruments did create in favor of Dhan Kunwar an absolute, and not a limited or restricted, right. Baboos *Anukul Chandra Mookerjee, Annada Prasad Banerjee, Mahes Chandra Chowdry, Chandra Madhab Ghose, and Rajendra Misery* for appellants.

Mr. Paul (Baboo *Amernath Bose* with him) for respondents.

In course of the argument the following cases were cited and commented upon :—

Sonatun Bysack v. Juggutsoondery Dossee (3), *Sreemutty Anundomoye Dossee v. Doe d East India Company* (4), *Wise v. Bhoobunmoye Debia Chowdrainee* (5), *Rajah Nursing Deb v. Roy Kylasnath* (6), *Mussamut Anundmoye Chowdrain v. Sheebchunder Roy* (7) *Tagore v. Tagore* (8).

The judgment of the Court was delivered by

HOBHOUSE, J.—We now come to the real merits of the case, and here, in order that we may clear the case for a right understanding upon its merits, it is necessary to state what are

(1) 1 B. L. R., P. C., 44.

(2) 2 B. L. R., F. B., 28.

(3) 8 Moore's I. A., 66.

(4) *Id.*, 43.

(5) 10 Moore's I. A., 165

(6) 9 Moore's I. A., 55.

(7) *Id.*, 287.

(8) 4 B. L. R., O. C., 103.

the admitted facts as to the relative position of the plaintiff and the defendants before us. Whatever may have been the contention on this point in the Court below, it is now admitted that Kalika Prasad, the father of Rani Dhan Kunwar, having died in the life-time of his father Harnarayan, the founder of the family, neither the plaintiff, nor his mother, nor his maternal grandmother, were the natural heirs to Harnarayan ; that in fact, neither he nor they could have taken this property at all, unless it had been given to them by the petitions on which the plaintiff relies. It is further an admitted fact that although the plaintiff attained to his majority upon the 21st May 1865, still he did not sue until the 29th April 1868, so that when he did sue, he had but some few days to spare ere his suit would have been barred by the Statute of Limitation. Of course, the plaintiff might have shown that between the time of his coming of age and the time of his instituting this suit, he had made other private endeavours to attain to his rights, or that for some good reason or other, he had been unable to make any such endeavours until the time of the institution of the present suit ; or that, in short, there was some good explanation for the plaintiff's remaining silent for more than two years and eleven months out of the three years, after the time when his rights accrued to him.

The plaintiff makes no explanation whatever, and it is impossible, therefore, not to hold that in this particular he appears before us in the most disadvantageous light possible. On the other hand, the position of the defendants is in comparison a far better one. He is admittedly a purchaser for a valuable consideration, and without notice, and he has been for fifteen years, previous to the institution of this suit, in undisturbed possession of the property, and of these fifteen years very nearly the whole of the three last years is made up of a period during which the defendants were in possession adverse to plaintiff, and during which it was at any time within the power of the plaintiff to endeavour to oust the defendants ; whereas, on the other hand, the plaintiff has not ousted them, nor, for any proof that there is on the record, made any attempt to do so. In this state of facts, the plaintiff does, undoubtedly, in our judgment, come before us in such an unfavourable light as compared with the

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defendants, that we think we ought to put the plaintiff to the strictest proof of the right on which he avers that he has the title to oust the defendants. Now, the sole evidence of that right is the petition of the 16th August 1830, the contents of which are given in the printed record, and are, with a very few emendations, which I shall incorporate in the following translation of the said contents, correct. The petition says:—

“The entire rent-free and rent-paying estates, and gardens appertaining to the Zillas of the Behar province, and buildings and ghat Tuazi, ryotkhanas, and household furniture, and other real and personal property which descended to my ancestors, one after the other, and at last to me, from Rani Myma Bibi, wife of my late brother Raja Basantaram, who, the said brother, was son-in-law of Maharajah Ram-narayan according to the Vyavasta of the pandits and decision of the Sudder Court, are now in my possession. But as in 1229 (1822), my son Kalika Prasad died, and in 1237 (1830), my younger brother Rai Ganga Prasad and his wife died, leaving no issue, and as my wife predeceased them, and only Rani Dhan Kunwar, the widow of my late son Kalika Prasad, is at present living, who has only two daughters, Mussamat Bibi Shitabo and Bibi Dilaru, and no other children or heir, I declare her (Rani Dhan Kunwar) my heir; and as with the exception of the said Rani Dhan Kunwar, I have no other heir or *malik*, nor can there be any, of which circumstances I have already preferred information in my petition of 16th April 1830, and life is uncertain; I consequently request that the name of Rani Dhan Kunwar, the widow of my late son, be registered in the Collectory mutation book as proprietor and malguzar in the place of my name, with regard to the property, both kheraji and lakhraji noted at the foot of the petition, situate in Zilla Patna. Further, as of Rani Dhan Kunwar there are two daughters, who, after marriage, by the blessings of Providence, may be blessed with children, they and their children, therefore, are and will be heirs and *maliks*. But as long as I live I shall keep the management of my household affairs in my own hands, and look after all the transactions of *dihat*, &c., myself as heretofore.” This petition, it must be said, was filed in the

Court of the Collector of Shahabad, and the ostensible object of it undoubtedly and admittedly was that Rani Dhan Kunwar's name should be substituted on the register of the Collector's mutation books as proprietor and *malguzar* of the revenue-paying estates of the petitioner Rani Harnarayan in the place of the names of the said petitioner. The effect of this would be that on the Collectorate books the said Rani Dhan Kunwar would stand in the place of the said Harnarayan as the person who was the proprietor of the revenue-paying estates of Harnarayan, and who was responsible for the amount of the Government revenue assessed on the said estates. This undoubtedly would be, generally speaking, the sole effect of a petition of this nature, but it may further be added that it is very common in this country, when persons are desirous of conveying their properties to other persons, that they do so by way of a petition to some one or other of the judicial or ministerial officers of the district in which their property lies, and, usually speaking, to the Collector of the district. As a consequence of this practice, there are many decisions of the Courts of this country in which petitions of this nature have been held to be of the nature of testamentary bequests from the petitioners. In fact, in the very case which is now before us, both the parties contend that the petition in question is of the nature of a testamentary bequest from Rani Harnarayan, the petitioner; and the sole contention is on the one part that the bequest was restricted, and on the other, that it was absolute.

We have considerable doubts as to whether, as a general rule, it is strictly right in law to consider petitions of this nature as anything more than expressions of the desires and intentions of the petitioner, but the doubt is, in this particular instance, materially allayed by the consideration that the intentions of the petitioner were not only declared, but that that declaration was followed up by a prayer, the definite object of which was practically a first step to carrying out the petitioner's intention by having the name of Rani Dhan Kunwar substituted for his own name as the recorded proprietor of his estates on the Government rent-roll. Such a step too was a very strong one, and, if the petitioner did not afterwards recede from it, was a very con-

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clusive step to take towards transferring the property from himself to some one else, *viz.*, to Rani Dhan Kunwar, and so we cannot but conclude this petition is a document of a gift of some kind or other to the said Rani. Then what is the nature of the gift? The petitioner first recites the whole of his estates, real and personal, of whatever nature they were, and wherever they might be situated. It then recites that these estates are at the moment in the possession of the petitioner. It further recites that Kalika Prasad, the son of the petitioner, is dead; that certain others, who would have been heirs of the petitioner, are dead, leaving no issue; and that only Rani Dhan Kunwar, the widow of his late son, and her two childless daughters, are living. Having thus recited these particulars, the petitioner goes on to say:—"So I declare her (Rani Dhan Kunwar) my heir; and as with the exception of Rani Dhan Kunwar I have no other heir or *malik*, nor can there be any, and as life is uncertain," so the petitioner requests that the name of Rani Dhan Kunwar, widow of his late son, be registered in the Collectorate mutation book as proprietor and *malguzar* of his estates in the place of his name. If the petition had stopped there, we do not think that there could have been any doubt as to what was the meaning of the petitioner; but it is contended that the next passage in the petition not only creates a doubt as to the meaning of the first passage, but actually restricts the gift which was made in the first passage to Rani Dhan Kunwar. The words relied upon by the learned counsel, Mr. Paul, for the respondent, are these:—"Further, as of Rani Dhan Kunwar, there are two daughters, who, after marriage, by the blessings of Providence, may be blessed with children; they and their children, therefore, are and will be heirs and *maliks*. But as long as I live, I shall keep the management of my household affairs in my own hands, and look after all the transactions of *dihat*, &c., myself as heretofore." Upon the strength of this passage, Mr. Paul contends that the gift was to Rani Dhan Kunwar for her life only; and that on her death, it was to descend to her two daughters; and after their death, to their heir, *viz.*, the present plaintiff.

On the other hand, Baboo Anukul Chandra Mookerjee, for

the appellants, contends that the last part of the document was nothing more than an expression at the best of the wishes and intentions of the testator—wishes and intentions which it was in the power of, Rani Dhan Kunwar, by the first part of the testamentary disposition, to defeat; and further, Baboo Anukul Chandra contends that, in truth, the passage is nothing more, upon a grammatical construction of it, and upon a comparison of it with its context, than an indication of who were the heirs, not of the testator, but of Rani Dhan Kunwar. If the testator had used words expressly declaring that Rani Dhan Kunwar's two daughters and children were and should be "his" heirs and *maliks*, some part of the difficulty of the sentence would have been explained; but the words literally translated are these "are and will be heirs and *maliks*," so that the testator does not in so many terms declare whether he was referring to those daughters and their possible issues as "his" heirs and *maliks*, or as Rani Dhan Kunwar's heirs. Neither, on the other hand, does he in so many terms speak of these persons as Rani Dhan Kunwar's heirs and *maliks*, so that the passage, taken by itself, cannot be interpreted in favor of or against either the one contending party or the other. But Baboo Anukul Chandra contends that, when the testator had, in so many terms, in the first part of the testament, said that Rani Dhan Kunwar was his heir, and that, with the exception of the said Rani he had no other heir or *malik*, nor could he have any, then it is impossible to say, when he spoke immediately afterwards of the daughters of Rani Dhan Kunwar and any, possible offspring of theirs, that he could have been supposed to be speaking of them as his heirs and *maliks*. It seems almost impossible to get over the difficulty thus presented. We had thought, when we first looked at the second sentence, that is the one on which Mr. Paul relies, that, as there must have been some intention in it, and as no other intention but the one for which Mr. Paul contended seemed to be obvious on the face of it, so the absolute gift of the first sentence must be held to be governed by what would then be the restriction in the second sentence; but, on further consideration, we think there exists in fact a good reason why the words should be there,

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and why yet they should not convey only that meaning for which Mr. Paul contends. We remark that, whether the gift was an absolute gift to Rani Dhan Kunwar, or a restricted gift, first to her, and then to her daughters, and their heirs after them, in either case, there was a restriction in the gift—a restriction to the effect that, as long as the donor lived, he should retain his properties, and transact the business connected with them as heretofore. It is quite possible, therefore, that he may have been providing for a contingency, viz., the contingency of the Rani Dhan Kunwar's deceasing before himself. In that case he might, and very reasonably would, have wished that the daughters of Rani Dhan Kunwar, and any children of theirs, should be heirs and *maliks*. Rani Dhan Kunwar was not to have the enjoyment of his estates so long as he lived; and if she predeceased him, what was more natural than that he should have wished that in such a case the daughters of the Rani, viz., Dhan Kunwar, and any offspring of theirs should be heirs and *maliks*. This is, we think, a reasonable explanation of the second paragraph; and when we consider the terms of the first paragraph as compared with the terms of the second, it is certainly a more reasonable explanation than the one on which Mr. Paul relies. If, as we think is the case, the second paragraph has no direct connection with the first, except to the extent above indicated, then it seems to us that there is, in the first paragraph, an absolute gift to the Rani Dhan Kunwar such as would entitle her to alienate the property; for, in so many terms, the testator declares her to be his sole heir and *malik* (that is, proprietor) and not only declares this, but prays that, in furtherance of this declaration, a step may be taken by which she may be made known to the world as such heir and proprietor; and if, as we believe to be the case, the second part of the sentence places no restriction upon the gift made in the first part, then Rani Dhan Kunwar having, as has been admitted by the plaintiff, come into possession of the entire estate, real and personal, and not being in so many terms restricted from alienating the estate, is not, by the terms of any law or usage which bind a Hindu family, prevented from alienating such estates. There have been, it may be mentioned, several

cases quoted to us on the one side, and on the other decisions given by their Lordships in the Privy Council. We have carefully considered the terms of those decisions, and we cannot say that any of them are, to our minds, either directly or indirectly in point, and help us therefore to any right determination of the question before us. In our view of the case, we hold that, by the document relied upon, an absolute gift was, in so many terms, made to Rani Dhan Kunwar of the properties in question; that she enjoyed those properties under the gift; that it was whilst she was in enjoyment of such properties that she alienated a part of them; and that as the gift itself was not, in so many terms, or even indirectly, fettered by any restrictions, so it was a gift which entitled her to alienate the estates to the defendants, appellants before us.

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In this view of the case, we reverse the decision of the Court below, and dismiss the plaintiff's suit with costs in both the Courts. Appeals, Nos. 237, 239, 245, 247, 255, 257, 259, 260, 264, and 273 are admittedly governed by the decision in this case; therefore, in those cases also we reverse the judgment of the Court below, and dismiss the plaintiffs' suits with costs of both the Courts.

[APPELLATE CRIMINAL].

Before Mr. Justice Bayley and Mr. Justice Markby.

THE QUEEN v. RAM CHANDRA MOOKERJEE.*

Act XXV of 1861, s. 62—Nuisance, Removal of—Power of Magistrate.

1870
May. 14.

Under section 62 of the Code of Criminal Procedure, a Magistrate has no power to issue an order, *ex parte*, to cut down trees, on the presentation of a party, supported by the report of the Police that the existence of the trees was a nuisance.

THE following reference was made by the Judge of the 24-Pergunnas, under section 434 of the Criminal Procedure Code :—

* Reference under Section 434, Act XXV of 1861, from the Sessions Judge of 24-Pergunnas, by his letter No. 57, dated the 30th April 1870.

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" I have the honor to submit the papers of a case in which Baboo Sama Charan Chatterjee, the Deputy Magistrate at Bashirhat, has sentenced one Ram Chandra Mookerjee to a fine of rupees 25, or simple imprisonment for one month, for disobeying an order issued under section 62 of the Criminal Procedure Code. I cannot interfere with the sentence, as the Deputy Magistrate has full powers ; but in my opinion the order should be set aside.

" It appears from the record of the case, that, on the 4th December last, Utam Chandra Chatterjee complained to the Deputy Magistrate that some clumps of bamboos growing close to his house produced sickness by stopping ventilation, and were likely to cause injury to the house. The owner of the bamboos was Ram Chandra Mookerjee, and the petitioner produced a copy of an order passed by the Deputy Magistrate, in September 1866, by which Ram Chandra was desired to remove certain bamboos, growing near the house of the petitioner. On receipt of this petition, the Deputy Magistrate desired the Police to examine the spot, and report the facts.

" On the following day the Police reported that the bamboos ought to be removed for police as well as for sanitary purposes ; and suggested that the owner might be directed to remove them, receiving compensation from Utam Chandra Chatterjee.

" On the 10th January, the Deputy Magistrate issued an order purporting to be an order under section 62 of the Criminal Procedure Code, directing Ram Chandra to remove the bamboos within a month ; and threatening him with punishment in case of disobedience.

" On the 28th January, Dinabandhu, the son of Ram Chandra, presented a petition on the part of his father, stated to be sick, in which he prayed that the Deputy Magistrate would visit the spot, and ascertain from personal inspection whether Utam Chandra had any reasonable ground of complaint. The order on this petition is, that the Deputy Magistrate had already visited the spot, and that a second inspection was unnecessary.

" On the 11th February, the Deputy Magistrate held a proceeding, in which setting forth the order issued a month previously under section 62, and observing that it had not been obeyed, he

directed that a charge should be preferred against Ram Chandra under section 188 of the Penal Code. 1870

“ On the 4th February, that is six days before the date of this proceeding, Dinabandhu had asked for the appointment of arbitrators, and the Deputy Magistrate, observing that the case could not legally be submitted to a jury, yet allowed him as a favour to name jurors. On the 14th he did name jurors, but it does not appear that any jury was appointed ; and on the 7th and 16th March; the Deputy Magistrate recorded evidence on the charge under section 188, and on the 23rd March passed sentence. QUEEN
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“ The Deputy Magistrate had no legal power to order the removal of the bamboos, and therefore he had no power to punish Ram Chandra for disobedience to it. It may be that the bamboos amount to a public nuisance, for I am satisfied that bamboos do injuriously affect the atmosphere under certain circumstances ; but it is evident from the order of the 4th February, that the Deputy Magistrate did not consider them to come, within the provisions of Chapter XX of the Criminal Procedure Code. On the case, as it appears from this record, the Deputy Magistrate, when he issued the order under section 62, could not have been satisfied that Utam Chandra had reasonable ground for asking for the removal of the bamboos ; and might have left it to Utam Chandra to remove his own house, if he found the situation unhealthy. If one man erects a building which intercepts light and air from the dwelling of another, the latter has his remedy in the Civil Court, and not under section 62. Section 62 is a wide and dangerous provision of the law ; necessary it may be, but requiring to be watched, that it may not become an engine of oppression. It appears to me that the proceedings of the Deputy Magistrate in this case have been arbitrary and unjust, and I recommend that they be set aside *ab initio*.”

The following was the opinion of the High Court :

MARKBY, J.—In this case the Deputy Magistrate, having the full powers of a Magistrate, directed one Ram Chandra to cause

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the removal of certain bamboos, because (as we gather), in the opinion of the Deputy Magistrate, they were injurious to the health of a neighbour who had complained to the Deputy Magistrate. The bamboos were growing on Ram Chandras own land. Some attempt was subsequently made to induce the Deputy Magistrate to proceed, not under section 62, but under section 308, and to appoint a jury. It is not very clear what steps the Deputy Magistrate took upon that application, but a jury was, in fact, never appointed. Subsequently, the bamboos not having been removed, proceedings for disobedience to the order of the Deputy Magistrate were taken against Ram Chandra, and he was sentenced to pay a fine of rupees 25. The case has been sent up to us by the Sessions Judge for consideration, with a view to its being set aside. The operation of section 62 has already been greatly restricted by the construction which this Court has put upon it in the case of *in the matter of Hari Mohan Malo v. Jai Krishna Mookerjee* (1). It was there held that, in any of the cases specified in section 308, the Magistrate had no discretion, but was bound to follow the more special directions of that section, which gave to the owner of the property an opportunity of showing cause before it can be removed or affected. The case before us is not one of those specified in section 308; this decision, therefore, does not apply.

It is impossible, however, to suppose that the Legislature intended to give to a Magistrate summary power to issue, without hearing the party concerned, an order such as that issued in this case, by which a man's property would be greatly injured, and could not be restored to its original condition, should it afterwards turn out that the Magistrate was wrongly informed, or that he had acted under a wrong impression. We think that the Magistrate has no power, under section 62, to issue any order which is by its very nature irrevocable. All that he has power to compel the owner of property to do is "to take certain order" with it. That does not appear to us to extend to an order to cut down a large quantity of trees.

(1) 1 B. L. R., A. Cr., 20.

We find that a somewhat similar view has been taken by this Court in the case of *Queen v. Sheikh Golam Darbesh* (1).

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We, therefore, consider the conviction was founded on an illegal order; and that the conviction as well as the original order of the Deputy Magistrate ought to be set aside, and the fine, if paid, restored.

[APPELLATE CIVIL].

Before Mr. Justice Bayley and Mr. Justice Markby.

HARGOPAL DAS AND ANOTHER (DEFENDANTS) v. RAM GOLAM SAHL
AND OTHERS (PLAINTIFFS) AND ANOTHER.
(DEFENDANT).*

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*Partition, Expenses of—Ameen, Remuneration of—Lieutenant-Governor—
Board of Review—Commissioner—Collector—Reg. XIX of 1814—Act XI of
1838—Act XI of 1859, ss. 5 and 33.*

On 12th June 1867, some of the proprietors of an estate applied to the Collector for a partition under Reg. XIX of 1814. On the same day, the Collector issued a notice to all the shareholders, including the plaintiff in this suit, calling upon them to come in within one month, and shew such cause, and offer such objections, &c., as they should think fit. It did not appear that the plaintiffs did come in or did anything upon this. Similiar applications were made by other shareholders. On 19th August 1877, the Collector drew out a tabular statement, purporting to be in pursuance of section 4, Regulation XIX of 1814. In it was a column giving the shares into which the expenses of the partition were to be divided. On the same day, a notice was issued to the proprietors, ordering them to pay their respective quotas of the expenses accordingly. It was said by the defendants that the apportionment was confirmed by the Commissioner on the 20th January 1868. On the 6th March 1868, it was ordered by the Collector that a proclamation should be issued in accordance with paragraph 4 of section 5 of Act XI of 1859, directing the plaintiffs, as defaulters in two sums of rupees 251-3-2 and 9-9-6, to pay the Government revenue. On the 26th March, such proclamation was issued accordingly. Subsequently, one of the plaintiffs came in, and offered to pay all that was then due and outstanding. His application was rejected; and on the same day, the 8th April, the sale proceeded, and the whole interest of the plaintiffs was sold for rupees 16,900. The plaintiffs

* Regular Appeal, No. 271 of 1869, from a decree of the Officiating Subordinate Judge of Tirhoot, dated the 28th August 1869,

(1) 1. B. L. R., S. N., 27.

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appealed to the Commissioner, but their appeal was dismissed. The plaintiffs, therefore, brought a suit against the purchasers and the Collector for recovery of the property and for cancelment of the sale.

Held, that the sale was void. There was no arrear of Government revenue justifying a sale under Acts XI of 1838 and XI of 1859, section 5. There could be no arrear until demand after sanction by the Board of Revenue and by the Lieutenant Governor of the estimate of expenses prepared by the Collector, and fixed by the Commissioner. The Board must give its sanction in each case, and the defendants failed to show that it had done so. But even if the Commissioner had power to finally determine the amount and date of payment, it was not shown that he had done so, or supposing that he had, that any fresh demand had been made upon the parties liable.

Per *Bayley, J.*—The completion of the partition is not necessary under Act XI of 1838 before the amount of unpaid expenses can become an arrear realizable by sale.

Semble.—The Government need not give its sanction in each case, but a "general" sanction will be sufficient.

Bajinath Sahu v. Lala Sital Prasad (1) followed.

Mr. *R. T. Allan* and Baboo *Rames Chandra Mitter* for appellants.

Mr. *R. E. Twidale* and Baboo *Gopal Lal Mitter* for respondents.

THE facts of the case are fully stated in the judgments of the Court.

BAYLEY, J.—Baboo Har Gopal Das and Hansraj Sahu are (defendants) appellants, *versus* Ram Gopal Sahi and others, (plaintiffs), and the Collector a (defendant), respondents.

The plaintiff sued for declaration of right and for possession of various shares in Mauzas Dhoondhee Pursoram, Koshra, and Chorah; Chuck (Mahamood, Molkudhwa, and Juggudispore, appertaining to a Government rent-roll talook, named "Char-raoh," and to cancel a sale by the Collector, held on the 8th May 1868, to realize the fees of a Batwara Ameen. It is alleged by the plaintiffs that certain co-sharers in a fractional share of the first of the above villages, *viz.*, Dhoondhee Pursoram, applied for a batwara, or partition, unknown to the plaintiffs, and paid the Ameen's fees. It is admitted by the plaintiffs that they did not pay the balance of the fees, and that the sale took place for the realization of such balance. The cause of action is stated to

have arisen on the 10th August 1868, the date of the confirmation by the Commissioner of the sale, for cancellation of which the plaintiffs bring this suit.

The *first* allegation in the plaint is that, the procedure under Act XI of 1838 has not been followed, and that the sale is therefore illegal.

The *second* allegation is that, as the Ameen's fees could not be deemed an arrear due till the batwara should have been completed, which this batwara had not been, the sale was null and void, as there could be no legal sale when there was no legal arrear.

The *third* allegation is that, when the sale took place, there was no such arrear due as is contemplated by Act XI of 1838, inasmuch as the sum due was tendered before the sale, and accepted by the Collector in the first instance; but, notwithstanding this, the sale was subsequently held.

The *fourth* allegation of the plaintiff is that, as the applicants for the batwara were Gavind Sahaye and others who represented only a fractional share of one village, and were so separately recorded in the Collectorate, the Ameen's fees should not have been called for or treated as an arrear due from other proprietors.

The *fifth* allegation is that, the share of each individual proprietor should have been adjusted and recorded, and the demand for the fees of the Ameen made accordingly, and that only the individual who did not pay could be treated as liable for an arrear; as this procedure against each individual has not been adopted, the notice passed on a different principle, and the amount of balance calculated on the same principle, and the notifications setting them forth, together with the sale proceedings, are all illegal.

Har Gopal Das and Hansraj Sahu, the purchasers at the sale, plead in answer: *firstly*, that the sale was held in accordance with the law and the rules prescribed by the Board of Revenue; *secondly*, that the Collector's sale proceedings and notices were in accordance with the Collector's own Collectorate records, according to which the Collector was bound to act; *thirdly*, that the main pleas as to the illegality of the sale, with reference to the provisions of Regulation XIX of 1814, and Act XI

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1870 of 1838, were not taken before the Commissioner, and consequently, under section 33, Act XI of 1859, could not be allowed to prevail in a regular suit; *fourthly*, that Act XI of 1859 provides that, when the Batwara Ameen's fees are once fixed, and are not paid, they shall be realized as an arrear of revenue by sale of the defaulter's estate on the rent-roll; and that, under Act XI of 1838, the completion of the batwara is by no means a condition of the arrear accruing so as to justify a sale; *fifthly*, that the Collector, after the last date fixed for payment, has a discretion to refuse or to receive the sum due up to the time of sale, and is not legally required to accept payment after a week of the last day fixed for payment (in this case, 28th March 1867); *sixthly*, that Manza Dhoondhee Pursoram is not a separate estate on the Collector's rent-roll, but a component part of Mehal No. 2101 on that rent-roll; that, under such circumstances, Gavind, as co-parcener of a portion of that village, was also a co-parcener of the whole of the estate No 2101; that, under these circumstances, the estate was liable to be sold on the default of Gavind, or any other recorded proprietor, to pay the Government revenue, and that an unpaid demand for arrears of batwara fees was a demand realizable by law in the same way as arrears of Government revenue are; *seventhly*, that the notices were legal, and plaintiff had full cognizance of the demand and of the impending sale, as he tendered payment before the sale.

The statement of the Government pleader for the Collector defendant was that the Government did not wish to defend the suit.

The Subordinate Judge, Baboo Bhupati Roy, in a careful judgment, has fully considered the pleadings. He states the points for decision to be :—

“ *First*.—The powers of the Collector to fix the expenses of an Ameen employed to effect a partition, and to call upon the proprietors of the joint estate, other than the applicants for batwara, to pay the amount before the estimated expense receive the sanction, in conformity with Act XI of 1838, and to levy the same as arrears of revenue before the division was completed.”

“ *Second*.—The authority of the Commissioner to sanction the

probable expense, without reference to the Government of Bengal."

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On these questions, the Subordinate Judge decides as follows:—"The plain object of the Legislature, as is apparently clear from the preamble of the Act, was to repeal section 15, Regulation XIX of 1814, and to remedy the mischief then complained of. Section 15 alluded to was to the effect that an authorized expense, viz., percentage on the jumma of the estate was to be allowed to the Ameen; a one-third of the above percentage was to be advanced to the Ameen before the commencement of the work; one-third on the work being half completed; and the remainder on the completion of the division." In repealing that section, Act XI of 1838 thus provides:—"It shall be lawful for the Board of Revenue, with the sanction of the Government of Bengal, to fix the expenses of an Ameen employed to effect a partition, and to cause the same to be levied from the parties concerned in the same manner as arrears of revenue, at such periods and in such proportions as the Board may think fit." The Subordinate Judge then goes on:—"The question that then remains to be solved is whether or not the demand was an arrear. I have in the first place been able to show that it was no demand at the time, as the probable expense was not fixed and determined by the Board in conformity with Act XI of 1838. It necessarily follows that there was no arrear to justify the Collector to issue notice under section 5. It was argued that the Collector, having estimated the probable expense, appointed a day for its payment, and the amount not being paid on the day specified became an arrear. This argument, I observe, is entitled to no credit, inasmuch as the Collector had no power to call upon the proprietors to pay the expense before it was fixed and determined by the Board."

"In the course of argument, it was urged that the Commissioner of Revenue in certain matters enjoys the power of the Board, and therefore the Commissioner of Patna was competent to sanction the expense to be incurred for the division of the estate. To support this argument, the pleader could not point out any law authorizing the Board to transfer to the

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Commissioner such duties as the Board, by a positive enactment, is bound to perform."

"The Commissioner is an authority to superintend the Collector's works, and is the proper channel for all communications with the Board. Assuming, however, that the Board, for the sake of convenience or facility of work, delegated its power to the Commissioner (which I can hardly think is the case), and granting that the Commissioner is empowered to fix the actual expense to be incurred in effecting a partition, without referring it to the Board, or without obtaining the sanction of the Government of Bengal, still it does not appear that the Collector could call upon the proprietors to pay the expense before it was fixed and determined by the Commissioner. The estimate, cost, and the establishment were sanctioned by the Commissioner on 30th January 1868; and, in accordance with the sanction, no day was appointed by the Collector calling upon the proprietors to pay their quota of the expenses. I do not understand, therefore, how the Collector could consider it as an arrear due by the proprietors, and issue notice under section 5, fixing the latest day of payment."

"I shall not at the same time omit to notice that, in the opinion of the Collector, this demand was an arrear recoverable as land revenue under clause 3, section 4, Regulation XIX of 1814. The section enacts that the expenses incurred in making the division are to be borne by the proprietors at large, in the proportions which the jumma of their respective shares, after the division has been completed, shall bear to the jumma of the whole estate. Now, looking into the words of the law, I venture to pronounce that the Collector could not possibly consider such demand as an arrear, unless and until the division has been completed."

The Subordinate Judge concludes:—"Under all the circumstances, I am decidedly of opinion that the Collector had no power to fix the expenses in effecting the partition; that he was not legally competent to call upon the proprietors of the estate to pay their quota of the expenses, before the estimated expense was determined by the Board, with the sanction of the Government of Bengal; that the demand, for the recovery of

which the Collector sold the estate, was not an arrear before the completion of the division, and therefore the Collector acted without authority, and consequently without jurisdiction in holding the sale of plaintiff's estate."

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"It was contended for the defendant that the plaintiff who appealed to the Commissioner, under section 26, Act XI of 1859, was debarred, by section 33 of the Act, to advance new pleas to contest the legalition of the sale. To this contention I do not altogether subscribe, for the sale which had a bad beginning cannot have a good end. If the Collector had no authority to hold the sale for the reasons stated above, it must, as a matter of course, become void, and the fact of the plaintiff's appealing to the Commissioner does not and cannot make the sale good, or stop or conclude the plaintiffs from advancing pleas other than those urged before the Commissioner to contest the legalities of the sale."

"The desision in *Baijnath Sahu v. Lala Sital Prasad* (1) should be referred to, which holds that the Civil Courts are competent to entertain a suit for the cancelment of a sale on the ground of illegalities, although the party seeking the relief had not appealed to the Commissioner."

"The conclusion, therefore, is that the provisions of Act XI of 1859 do not apply to the plaintiff's case. The third issue, I observe, is no more necessary for the purpose of this Case."

The Subordinate Judge having decreed the plaintiff's suit, the defendants, auction-purchasers, appeal on the following grounds :—

Firstly.—The lower Court is wrong in holding that the Collector had no authority to apportion the fees of a Batwara Ameen.

Secondly.—That the power conferred by Act XI of 1838 on the Government, and that conferred upon the Board of Revenue, has been delegated to the Commissioner of Revenue, hence the lower Court is wrong in this case to hold that the Collector had no jurisdiction to hold the sales.

Thirdly.—The precedent quoted by the lower Court does not apply to this case, for in the Full Bench case, a Civil Court

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having declared that the plaintiff was not to be liable for any expenses of batwara, there was nothing due from him, which was recoverable as arrears of Government revenue. But that here it is clear that the plaintiff was liable for something realizable from him as arrears of Government revenue, being his quota of the batwara expenses, therefore the lower Court has erred in holding that the plaintiff's claim should not have been entertained at all under the provisions of section 83, Act XI of 1859, as these points had not been raised before the Commissioner of Revenue.

It is admitted before us that there was the tender of payment before the sale as alleged ; that the amount to be paid, if in arrear, was, as stated by the Collector, rupees 241 ; that the statement notifying the arrears to be payable on the 28th March was dated the 6th. And here I may observe that some stress was put upon the Board's Circular Order of the 30th August 1854 (batwara series), and in the book of Mr. Chapman, Secretary to the Board, paragraph 8, page 50, as indicating 30 days as the period of notice, whereas the above interval was only 22 days. But the law enacts that, not less than 15, and not more than 30, days shall be the interval (1). The Board's Circulars may be intended as guides for the Revenue Officers subordinate to the Board of Revenue, in matters of revenue administration, but the Circulars or Rules are not law for Courts of law, or even law for Revenue Officers when sitting judicially.

As to the payment before the sale, I am of opinion that there was no illegality in refusing it, whatever absence of administrative discretion there might be, even on the very grounds stated by the Collector and Commissioner for refusing to take the payment in this case.

The main question before us is one of law, viz., whether the Collector acted in conformity with Act XI of 1838 so as to justify his treating the demand for rupees 241, unpaid Batwara Ameen's fees, as an arrear of Revenue, and selling the whole estate as under Acts XI of 1838 and XI of 1859. If this first and main question be answered by us in the negative, then the other grounds of appeal need not be considered.

(1) Act XI of 1859. s. 6.

Now I do not hold that the Board must, under Act XI of 1838, obtain the sanction of the Deputy Governor of Bengal in every case, and I think a general "sanction" would be within the purview of the law. Next, if Government has given a general sanction to the Board of Revenue, then the Board can, I think, make a general order, declaring in what sums, from whom, and at what period payable, the remuneration of the Ameen shall be levied.

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Now there is an order of the Deputy Governor of Bengal to the Board of Revenue (dated July 15th, 1840, No. 24) printed in Volume 2, page 10 Jones's Circular Orders, conveying the instructions of the Deputy Governor to the Board sanctioning batwara establishments. The larger term "establishments" includes, I think, the minor details, viz. the amount of fees, and the period and apportionment of their realization, all which are necessary under the law to put in form, and to render operative the "establishments" in question.

The Board have, however, to sanction in each case the establishment estimated in the statement to be prepared by the Collector for the purpose, and then that establishment has to be fixed by the Commissioner. This statement shews the amount of fees, the periods at which it is due, and from whom, and in what proportions. If, after this has been done by the Commissioner, the sanction of the Board is accorded, then, I think, under the provisions of Act XI of 1838, the amount of Ameen's fees not paid on demand according to the Collector's statement so fixed by the Commissioner, and sanctioned by the Board, would become an arrear of revenue liable to be realized by sale in the same way as an arrear of Government revenue.

I further think that the Subordinate Judge is wrong in holding that such unpaid amount is not an arrear until after completion of the batwara. Such it is true, appears to have been the law as laid down in clause 3, section 4, Regulation XIX of 1814. But the subsequent Act (XI of 1838) supersedes that law. The later law states that the Board, with the sanction of Government, may cause such remuneration (of a Batwara Ameen) to be levied at such periods, or by such apportionment, as the Board may decide. But in this case it is not shewn to us that the

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Board's sanction was ever obtained, or that the Commissioner ever fixed the establishment. The Collector's tabular statement has an unattested note to the effect that the Commissioner passed the establishment proposed by the Collector in that statement, by a letter of the 30th July 1868, but no such letter is shown us, nor is any legal evidence of such act of the Commissioner placed, or attempted to be placed, before us. This is itself to my mind one fatal objection to the sale, for all admit that at least the Commissioner's sanction is necessary.

We are referred to the marginal note of paragraph 5, page 49 of Mr. Chapman's book, which says :—"Commissioners may sanction "establishments subject to formal sanction." But Act XI of 1838 does not say so. As before observed, the law is to be found in the Act of the Legislature, not in the handbook (however ably arranged) of administrative details prepared "by order of "the Board of Revenue."

Going however further, I hold that the Commissioner's sanction, had it been legally shown to have been given, would not have been enough by law, because I think that, under Act XI of 1838, the Board's sanction is absolutely necessary. Regulation I of 1829 did give Commissioners the powers of the Board to a large extent, but here we have Act XI of 1838 subsequently enacting especially that, as to batwara establishment, and the amount and proportion and proper time of realizing fees for such establishment, the Board's sanction is necessary. Now in this case the Board's sanction is not shown to have been conveyed to the Commissioner or the Collector for the statement fixing the batwara establishment, that is, the Ameen's fees, their amount, periods of realization, and the proportion in which, and parties from whom, they were to be levied. I hold then that the sale, as for arrears of Government revenue, for the balance set forth as due as fees in that statement, is illegal under Act XI of 1838 ; in other words, that there is no legal arrear under section 5, Act XI of 1859, and consequently no legal sale at all.

In this view it is unnecessary to go into what would be the effect of section 33, Act XI of 1859, as to the plaintiff not having appealed on certain points to the Commissioner. The same

remark applies as to other subordinate pleas raised in the arguments on both sides.

I would affirm the judgment of the Subordinate Judge, and set aside the sale by the Collector. The defendant to pay all costs.

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MARKBY, J.—In this case, as is most frequent, and I must say, as I think, by a practice which is most objectionable, notwithstanding the very complicated nature of the proceedings which we have to consider, no part of them has been laid before us during the argument, and I should have been scarcely able to express any opinion at all in this case, had it not been for the courtesy of the pleaders who have supplied me with their own translations since the case was argued.

As far as I can understand, on the 12th June 1867, Gavind Sahaye and others, proprietors of a one-third share of mauza Dhoondhee Pursoram, one of the eight mauzas of Mehal Charraoh, applied for a partition under Regulation XIX of 1814. On the same day, the Collector issued a notice to all the shareholders, calling upon them to come in within one month, and show such cause, and offer such objections, and make such representations as they should think fit. Mussamat Ganga, proprietor of a half share in Phoolwara, another mauza in the same mehal, made a similar application. Panchowry Sahaye, the proprietor of 1 anna 4 gandas share of Charraoh, a third mauza in the same mehal, made a similar application. And lastly, Fati Narayan Sahaye, the proprietor of 17 gandas 8 krants share in the last mentioned mauza, made a similar application. Notice of the first of these applications was served upon the plaintiffs, who are owners of shares in several of these mauzas, but they appear to have done nothing in respect to it; nor did they take any part, as far as I can discover, in the matter, either to assist or impede the partition.

The proceedings for a partition appear to have been based on all of these applications; and on the 19th August 1867, the Collector drew out a tabular statement, purporting to be in pursuance of section 4 of Regulation XIX of 1814. In this the particulars of the property which is to be divided are mentioned. In the column which contains the "Names of Proprietors," the

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above mentioned applicants are described as first, second, third, and fourth petitioners respectively. Ram Golam Sahay and others are described as one set of defendants, and Deon Roy and others are described as a second set of defendants. The name of the Ameen is then given, and the amount of personal allowance which he is to have. Then comes the amount of commission, which is directed to be paid as soon as the advertisements are issued; and then follows the column which is the important one for this case, which professes to give the shares into which the expenses are to be divided. On the same day a notice was issued to the proprietors, ordering them to pay their respective quotas of expenses accordingly.

The apportionment of expenses is said to have been confirmed by the Commissioner on the 20th January 1868. It never received any other confirmation prior to the sale hereinafter referred to.

On the 6th March 1868, an order was made by the Collector, founded on a schedule in which the names of the plaintiffs appear as defaulters for two sums, rupees 251-3-2, and rupees 9-9-6, that a proclamation should be issued in accordance with paragraph 4 of section 5 of Act XI of 1859, directing the defaulters to pay the Government revenue, by which, no doubt, was meant the expenses of this partition, on Saturday the 28th March 1868, and such proclamation was accordingly issued.

After this date had expired, one of the plaintiffs came in and offered to pay all that was then due and outstanding for the expenses. At that time no expenses had actually been incurred, and the Collector ordered the amount to be deposited, and said that he would pass a proper order before the day of sale. On the 8th April, the day fixed for the sale, the Collector held that there were "no valid grounds for the neglect to deposit the *condamnation*. The notices were first issued in July 1867, and "the plea now put forward (by the applicants) that they were "on a pilgrimage, is admittedly an absurd one, as they allow "that they only started on this pilgrimage 1½ months ago. It "is very necessary to put a stop to the delays that are put in "the way of *batwaras* by those who object to them. Application "rejected." The sale accordingly proceeded, and the whole

interest of the plaintiff's *mal* in the mauza, was accordingly put up for sale, and sold for rupees 16,900.

The plaintiff then appealed to the Commissioner who seems to have received some report from the Collector on the subject, and he states that, under the circumstances reported by the Collector, he declines to interfere. He says :—"The *misl* has "been carefully inspected, and no irregularity appears upon "the papers. The case may appear hard at first sight, but "it is a common thing in these batwara cases for *maliks* to "withhold payment of *oonda*, simply to give trouble and "annoyance, and prevent the completion of the batwara proceedings. It is such conduct as this on the part of proprietors "which keeps these batwara cases on the file for years and "years. Appeal dismissed."

The plaintiff accordingly brought this suit, to recover from the purchaser the property sold, and the Subordinate Judge of Tirkoot has, for reasons which I consider sound and satisfactory, held the proceedings of the Revenue authorities to be wholly irregular; that there was never any apportionment of the expenses by the proper authorities, and consequently no arrear for which the property could be sold.

Besides the very important interests at stake between the parties, the question which arises in this case is one which requires a very careful consideration, because it shows that the Revenue officers take a wholly different view of the procedure to be adopted in these batwara cases and the powers which they possess from that taken by the Subordinate Judge, by myself, and, I believe, by Mr. Justice Bayley also. In the Regulation (I of 1793) in which the general policy to be followed in revenue matters is declared, Government, as might naturally be expected, contemplated the necessity which would arise from the subdivision of estates which were then assessed singly, of apportioning the revenue between the several owners. That Regulation does not, however, seem to contemplate that the officers of Government would take any part in the division of an estate between shareholders, but only that, when a division had been made, that the Revenue authorities should be informed of it, in order that the revenue might be properly apportioned upon the several shares

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into which the estate was divided. But in the special Regulation of the same date (Regulation XXV), it is directed (section 4, clause 1) that not only the apportionment of the revenue, but the division of the estate itself, is to be made by the Collector. By clause 1 of section 4, if all the proprietors do not join in the application for a division, the expenses of the partition are to be borne by those who apply in the proportion of their shares : substantially the same provisions are made by Regulation XXVI of 1803, section 32, clause 1. Both these provisions are repealed by Regulation V of 1810, and it is provided by section 3, clause 2, that in all cases the expenses of the partition are to be apportioned between all the proprietors in proportion to their jummas ; and if they are not paid as apportioned, they are to be levied by the same process against defaulting proprietors as is prescribed for levying arrears of revenue.

All these Regulations are repealed by Regulation XIX of 1814, but the provisions of Regulation V of 1810, section 3, clause 2, are substantially re-enacted by section 4, clause 3 of the new Regulation. By section 15 of this Regulation, a scale is laid down for the expenses and remuneration of the Ameen. It is not very clear on these provisions, whether the Collector or the Board is the authority which is to fix and apportion the expenses. All the proceedings of the Collector, however, are to be reported to the Board, and only "authorized" expenses can be apportioned. I imagine, therefore, that the expenses must have been authorized by the Board under this Regulation.

Section 15 of this Regulation is repealed by Act XI of 1838, but not section 4, clause 3. By section 2 of this Act, the Board of Revenue, with the sanction of the Governor (now Lieutenant-Governor) of Bengal, is to fix the remuneration of an Ameen or other persons employed to effect a partition of an estate under the Regulation enacted for that purpose, and to cause the same to be levied from the parties concerned in the same manner as an arrear of revenue at such period and in such proportions as the Board may think fit.

I have some difficulty in discovering what view the Board of Revenue and the Government of Bengal took of their duties under this provision of the Legislature. Up to the year 1850,

- I cannot discover that anything at all was done beyond generally directing Collectors to do their duty. In the year 1850, however, a letter was written to the Commissioner (6th December 1850, No. 76), which reprobates the practice of receiving the whole expenses from the applicant shareholders, as provided for by Regulation XIX of 1814, section 4, clause 3; and orders that, to obviate this, the direction to all the proprietors to contribute to the expenses should be made at the date of the application for partition. It is admitted that this will lead to delay, but it is pointed out that justice renders submission to delay unavoidable.

This Court does not possess copies of the orders of the Board of Revenue of the years 1852 and 1853, but that just now stated as well as a great many previous and subsequent orders were rescinded by an order of the 30th August 1854. This directs the Collector to make to the Commissioner a preliminary report in the form of a tabular statement, and the Commissioner is declared competent to authorize the entertainment of the necessary establishments for the partition of any estate, and to fix the amount of remuneration to be allowed, furnishing quarterly statements for the eventual sanction of the Board. The Collector is directed to estimate the expenses likely to be incurred; and when the amount and time of collection have been determined, notices are to be served on the proprietors, informing them that a batwara has been applied for, of their liability to pay a quota of the expense; and informing them also that, unless they do so, their interest in the estate to be divided will be liable to sale. The tabular form annexed to the order contains no column for the apportionment of expenses, but it was probably intended that this should be included in the Collector's report.

Subsequently the Secretary of the Board of Revenue, with the authority of the Board, published a collection of the Board's Rules, in which the order of 30th August 1854 appears, but with important modifications. The form in which the Collector is to report to the Commissioner contains a column for the proportions in which it is "proposed" to levy the remuneration of the Ameen, and the eventual sanction of the Board which

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1870 is to be given to the expenses, and the apportionment is described as "formal" only.

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How far these orders of the Board of Revenue were made with the concurrence or sanction of the Lieutenant-Governor of Bengal, does not appear from anything that is laid before us.

I find the same difficulty about gathering from these orders the view which is taken by the Board of the respective duties of the Commissioner and Collector, as I do in ascertaining what view they take of their own. No evidence or statement as to the practice of the Revenue Courts has been laid before us, but I suppose I must assume it to be that which the Collector has adopted in this case, which, as I understand it, is this. He has treated his notices to the shareholders to pay their respective quotas of expenses as sufficient to constitute such a demand as will render defaulters liable; provided only that his report is subsequently adopted by the Commissioner. I am also inclined to think that this is the practice which the Board intended its officers to adopt.

I am, however, of opinion that such a practice is not in conformity with the provisions of the law. As I have already said, section 4 of Regulation XIX of 1814 appears to me to treat the proceedings of the Collector, in ascertaining and apportioning the expenses, as undertaken solely for the information of his superior authorities. At any rate this is clearly the nature of his proceedings after the passing of Act XI of 1838, and they are so treated by the Board's Rules issued in 1854. The proceedings of the Collector, therefore, cannot in any way constitute a demand which will create a debt due from the shareholders; and under the orders which it has been thought fit to issue (though I do not at all intimate that a more simple and convenient course might not have been adopted), I think nothing is due until the remuneration of the Ameen has been sanctioned by the Board of Revenue, and by the Lieutenant-Governor of Bengal, and the time at which the expenses are to be levied, and the proportions have been sanctioned by the Board of Revenue. It seems to me that the Lieutenant-Governor has expressly reserved his control over these expenses by the Circular Order of July 15th, 1840, the Board of Revenue being authorized to

sanction batwara establishments, but subject to the eventual orders of Government, on the submission of a general half-yearly statement. I do not think any one has a right to treat the sanction of the Lieutenant-Governor, or of the Board of Revenue, as merely formal, so as to make it a matter of indifference whether that sanction has or has not been obtained. It is true that the powers possessed by the Board were transferred to the Commissioners by Regulation I of 1829, but it is only the powers then possessed by the Board of Revenue, and until otherwise provided by law. There was not, therefore, in my opinion, even until the date of sale, any such sanction of the demand on the plaintiff as would constitute a final determination of the amount, or date of payment or not, and therefore there could be no arrear.

But I also think that even if the sanction of the Commissioner had been sufficient, and could be considered as having finally determined the amount due from the plaintiffs, and the date of payment, still there was no arrear until there had been a second demand of the amount from the parties liable, after this final determination had been come to. This claim on the part of Government is not like a claim for an arrear of revenue, the exact amount and date of payment of which the parties know before hand, but it is a matter of estimation and calculation, and I do not think that there can be said to be any default, until after the amount due from each person or set of persons is finally ascertained, the date of payment finally fixed, and a demand made in accordance therewith. It was contended that the proclamation of the 6th March 1868 was a sufficient demand; I do not think so. There is no information contained in it that the final determination of the Commissioner (even supposing it to be final) has been come to. Moreover I understand it to be the opinion of Mr. Justice Bayley, and in this I concur, that, before action can be taken under section 5 of Act XI of 1859, there must be an arrear, whereas when this proclamation was issued there was no arrear, this being the first demand after the amount had been finally ascertained.

In addition to these grounds, it was contended that there was no evidence that the report of the Collector had been sanctioned

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by the Commissioner. The Subordinate Judge found that it was so sanctioned, and a memorandum to that effect appears upon the Collector's report. I should not be inclined to disturb the Subordinate Judge's finding on this point.

It was also contended that the reasons given by the Commissioner and the Collector for refusing to accept payment when tendered under section 19 of Act XI of 1859 were altogether insufficient, and such as ought not to have influenced them in exercising their discretion. The facts of this part of the case as stated are, as it appears to me, not a little extraordinary, and I have had a good deal of hesitation in accepting them as true. They have, however, not been denied, though the Collector, and through him the Government, is a party to the suit. For the purposes of this case, therefore, I must accept them as true.

As we are informed, long before the day of sale, above half the expenses of the batwara had already been placed in the hands of the Collector. Notwithstanding this, however, nothing had been done towards the division of the estate, though it may be fairly supposed that there was sufficient in hand to carry that proceeding a good way towards completion. Even had there been any risk of exceeding that amount before notice could be given that the funds were exhausted, the Collector had always in reserve the power of recovering it by the sale of property, which was worth, as it turns out, sixty times the amount. I can conceive no reason, therefore, why this batwara should have been delayed a single day, and none is assigned by the Collector or Commissioner. It seems rather as if the plaintiff were treated as contumacious in not obeying the order for payment of his quota, and that the tender was refused by way of punishment as an example to others. I am most unwilling to adopt this view of the proceedings, but I can see no other interpretation of the words in which the decisions are expressed when taken with reference to the facts laid before us.

It is of course quite clear that the very extraordinary powers put into the hands of Revenue officers were never intended, even in the case of a default in payment of revenue, to be used for any other purpose than for the protection of Government from

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loss, and then only so far as was actually necessary ; and in cases where nothing was really due to Government, as in this case, and Government is, as far as I can see, in no way interested one way or other in carrying on the proceedings, it is obvious that the powers ought to be exercised with still greater caution. But though the power of exemption given to the Collector and to the Commissioner, by section 18 of Act XI of 1859, no doubt makes it incumbent on these authorities to hear and decide upon any application for exemption which may be made by the defaulting parties ; and though I cannot accede to the views taken by those authorities as to the mode in which that application was to be considered, I do not think that the error complained of in disposing of such an application could be said to vitiate the sale. Lastly, it was contended that there never had been, even by the Commissioner, any such apportionment of the expenses as the law requires. I think there has not. In the tabular statement submitted to the Commissioner, and which is relied on as the apportionment, I find in the column headed "Names of Proprietors," the following :—"Gavind Sahaye, Kahi Charad Sahaye, Dayal "and Udit Narayan Sing, first petitioners; Mussamut Gangapat "Koer, second petitioner; Ram Charan Sahaye third petitioner ; "Ram Golam Sahaye and others, defendants ; Bandhu and others, "petitioners; Deon Roy and others, defendants." In the column headed "Shares of Oonda," I find the following :—"First share, "rupees 4-12-10; second share, rupees 33-11-9; third share, rupees "18-1-8 ; fourth share, rupees 471-6-10 ; first share, rupees 4-6-3 ; "second share, rupees 24-13-9." From this it might possibly be inferred that the persons described as "Ram Golam Sahaye and "others, defendants" were to pay rupees 471-6-10. But in the notices issued, the sums required are altogether different, namely rupees 376-14-11, rupees 15-9-5, rupees 14-6-4, rupees 53-13-0, rupees 33-11-8, respectively. In these notices, the name Ram Golam Sahaye appears twice. He is called upon, together with a number of other persons who are named, to pay two sums of rupees 376-14-11 and rupees 14-6-4. I cannot reconcile this with the apportionment in the Collector's report. Two other tabular statements were laid before us, which we have not been able to find upon the record, but which were suggested as recon-

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ciling the report with the notices issued. They do so to some extent, but not fully ; and even if they did so fully, they would show either that the apportionment submitted to the Commissioner was incomplete, or that it had been subsequently modified. The defendants, therefore, have failed to satisfy me on the evidence before us that the sums actually demanded were sanctioned even by the Commissioner.

I think therefore that this sale is absolutely void, on the ground that there never was any arrear for which the estate could be sold. I think the sanction of the Commissioner is not sufficient for a demand, which on default may be treated as an arrear of Government revenue ; and even if the Commissioner's sanction were sufficient, I think there was no arrear when the sale proclamation of the 6th March was issued, and that disobedience to that proclamation did not create one ; and further that the arrear which is alleged to be due by that proclamation is not any portion of a demand which had been sanctioned even by the Commissioner.

It was contended that these objections were not taken in the appeal which the plaintiff made to the Commissioner after the sale had taken place, and therefore they could not be entertained by this Court by reason of the provisions of section 33 of Act XI of 1859. But I think, for the reasons stated, that there was no arrear ; and it was hardly contended that in this view this case could be distinguished from the decision in *Baijnath Sahu v. Lala Sital Prasad* (1), where it was held that, as nothing was due, the Revenue authorities had no jurisdiction to proceed to a sale.

For these reasons, I think, the appeal ought to be dismissed with costs.

(1) 2 B. L. R., F. B., 1.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

MAHES CHANDRA CHATTAPADHYA (PLAINTIFF) v. GURUPRASAD ROY (DEFENDANT)*

1870
April 28.

Moveable Property—Act X of 1859, ss. 86, 99—Act VI of 1862 (B. C.), s. 17—Act VIII of 1859, ss. 236, 265—Execution of Decree for Rent—Collector, Sale by.

A. obtained a decree against B., for arrears of rent. C. was an under-tenant of B. under an ijara lease. In executing A.'s decree against B., the Collector sold the "rights and profits of the debts due for rent" from C. to B., for the years 1273-4-5.

A. became the purchaser, in a suit brought by D., as assignee of A., rents alleged to be due for the years 1273-4-5.

Held that, for the purposes of Act X of 1859, rent is moveable property; and that the Collector, therefore, was competent to effect the sale to A.

Chandrakant Battacharjee v. Jadupati Chatterjee (1) distinguished.

THIS was a suit brought before the Deputy Collector of Moorshedabad, on the 16th June 1869. The suit was brought to recover from the defendant arrears of rent amounting to 693 rupees, together with interest amounting to 107 rupees,—in all 800 rupees.

The circumstances of the case were as follows: The plaintiff alleged that one Godhen Mandal, *alias* Lutafat Hossein, had obtained an *ex parte* decree against one Mr. Robinson, for rent due under an ijara lease, and, in execution of that decree, a sale took place, at which Godhen Mandal became the purchaser of "the right and profits of the debts due for rent to Mr. Robinson, for the years 1273, 1274, 1275 (1866, 1867, 1868.)" from his under-tenant, the defendant in the present suit. That, subsequently to his purchase of Mr. Robinson's interests in the rents claimed, he, Godhen Mandal, had assigned them by a deed of sale to the plaintiff. The present suit was brought under Godhen Mandal's deed of assignment.

The defendant stated, first, that plaintiff had no cause of action against him, inasmuch as no relationship of landlord and tenant

* Special Appeal, No. 111 of 1870, from a decree of the Judge of Moorshedabad, dated the 18th December 1869, reversing the decree of the Deputy Collector of that district, dated the 16th June 1869.

(1) 1 B. L. R., A. C., 177.

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existed between them ; secondly, that he had already paid to his landlord, Mr. Robinson, the sums due for the years 1273, 1274, 1275, before Godhen Mandal had instituted his suit against him.

On the evidence, the Deputy Collector considered that the defendant had failed to prove his allegation of having paid the rents to Mr. Robinson. As to the first plea set up by the defendant, he was of opinion on the production of the certificate of sale in execution obtained by Godhen Mandal, and his deed of assignment to the plaintiff, that the plaintiff took the position of Mr. Robinson, as landlord of the defendant ; and upon reference to *Shama Soonderee Dossee v. Bindabun Chunder Mozoomdar* (1) and *Binode Beharee Mookerjee v. Beer Narin Roy* (2) that the plaintiff could institute this suit under Act X of 1859. He gave a decree for the plaintiff accordingly.

The defendant appealed to the Officiating Judge of Moorshebad, who was of opinion that “ in a general way any assignee, whether by purchase or otherwise, certainly succeeds to the rights assigned to him in a legal manner ; and in the ordinary transactions of life, an assignment of debts due to A., by A. to B., would be sufficient to authorize B to collect such debts. But, in the present instance, the transaction must be tested by the provisions of Act X of 1859.

“ Now Act X of 1859, nowhere provides for the sale in execution of decree of a right to collect rents, for a certain period of years, such as is said to have been sold in the present instance. Plaintiff could only obtain a right to collect such rents, by the sale under section 105, or 109, Act X of 1859. But it is not contended, and in fact cannot be contended, that, in the present case, there was any sale of the tenure, for which rent was in arrears under section 105 ; nor was there any sale of immoveable property under section 109. Respondent's pleader has argued, that the sale must be regarded as a sale of ‘moveable property.’ But it is impossible to apply the rules laid down in sections 87, 98, and 99 of Act X of 1859, to a sale of debts due to a judgment-debtor ; and the absence of any specific provisions as to the mode in which

(1) Mar., 199.

(2) 5 W. R., Act X Rul. 5,2.

an attachment under sale of debts should be effected (such as are contained in sections 236 and 265 of Act VIII of 1859) leads me to the conclusion that no sale of personal debts due to a judgment-debtor, in execution of a decree under Act X of 1859, can be upheld as a valid transfer of the rights to recover such debts.

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“ With reference to defendant’s second plea, it appears that he failed to prove payment of the money alleged by him. It is unnecessary to enter into this question at present. But I may remark that, in all cases of this nature, some notice to the tenant should be proved. *The Collector of Rajshahye v. Hursoondery Debea* (1) and *Thakoor Doss Gossain v. Petumber Roy* (2).”

He decreed the appeal and dismissed the suit, and the plaintiff appealed to the High Court.

Baboo *Mahini Mohun Roy*, for appellant, contended that the unrealized arrears of rent were “moveable property” and “debtor’s effects,” within the meaning of section 87 of Act X of 1859, and were, therefore, capable of being attached under an Act X decree.

Baboo *Mahendra Lal Seal*, for respondents, cited *Ohandrakant Bhattacharjee v. Judupati Ohatterjee* (3), and urged that, in execution of a decree in an Act X suit, the Court could only issue an execution against property which was capable of manual seizure : such was not a right to collect rents.

The judgment of the Court was delivered by

JACKSON, J.—The question raised in this special appeal is, whether, in execution of a decree for arrears of rent, under Act X of 1859, the Collector has power to sell the right of the judgment-debtor to recover rent, being at that time due from the under-tenant. In the case before us, the superior landlord had recovered a decree for rent against Mr. Robinson, his lessee, and, in execution of his decree against him, he procured to be sold

(1) W. R. 1864, Act X Ral. 6.

(2) S. D. A., 1859, 820.

(3) 1 B. L. R., A. C., 177.

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Mr. Robinson's right to recover rent against his under-tenant, Guruprasad Roy. It has been held by both the Courts below that rent was due, at the time when the sale took place, from Guruprasad Roy to Mr. Robinson; therefore, the only question is, whether the sale by the Collector, in execution of the Act X decree, gave the purchaser a right to sue for the rent.

The Judge has held that it did not; but it seems to me that the Judge was mistaken in that view, and that the sale could be lawfully made, and is valid.

Section 86, Act X of 1859, has been re-placed by section 17, Act VI of 1862, B. C., and that section provides that—"the process of execution may be issued against either the person or property of the judgment-debtor, but process of execution shall not be issued simultaneously against both the person and property." And then section 87, Act X, provides,— "that any moveable property required to be seized under an execution, shall, if practicable, be described in a list to be furnished by the judgment-creditor;" and then the section goes on to say, "the property to be seized shall be pointed out to the officer entrusted with the execution of the process, by the creditor, or his agent." The question, therefore, is, whether rent due, being a debt, is included in the words "moveable property."

I find that in Act VIII of 1859, which was passed a very short time before Act X, debts due to the judgment-debtor, from the party answerable for the amount of the decree, are enumerated among the kinds of property which may be attached and sold; and are not therein reckoned as immoveable property, but are clearly classed as moveable. It is very unlikely that the Legislature, in passing about the same time two such Acts as Act VIII and Act X of 1859, should have used the same expression "moveable property," including under it debts and such matters in the one Act, and excluding them in the other. Act VIII of 1859 contains much more elaborate directions for attachment and sale than Act X contains. Act X seems, as it were, to compress into one or two sections all that is elaborately provided for in the various sections relating to that subject in Act VIII.

It is admitted that a landlord may assign his right to recover

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rent to a third party, and that such party, under the assignment, may proceed to sue for, and recover, this rent by suit under Act X of 1859. If that be so, we have not much difficulty in arriving at the conclusion that the Collector's Court might sell, under the denomination of moveable property, that which the landlord himself might assign by private sale.

We have been much pressed by a decision in *Chandrakant Bhattacharjee v. Jadupati Ohtatterjee* (1), in which it is contended that the Court laid it down that a Collector's Court is incompetent to sell, in execution of a decree under Act X of 1859, the rights of the judgment-debtor in any suit. It appears to me that the decision of the Court in that case went by no means so far as the respondent's vakeel contends before us to-day. (Here the learned Judge recited the facts, and read the judgment of the Court upon the point, in the case of *Chandrakant Bhattacharjee v. Jadupati Ohtatterjee* (1).

Baboo Mahendra Lal Seal for the respondents has read to us a passage from Mr. Warren's Blackstone, in which rents are described as incorporeal property. It seems to me that this definition does not press us to decide the point. It is sufficient to say that rents seem to me to come, for the purposes of Act VIII, as well as of Act X of 1859, within the terms "property," and "moveable property;" I think, therefore, that the Collector was competent to sell these rents, and that the purchaser by that sale acquired a legal title to recover the rents, and that he was competent to maintain the suit; and was, therefore, entitled, the rents being due, to a decree. I think, therefore, that the decision of the lower Appellate Court must be reversed with costs.

(1) 1. B. L. R., A. C., 177..

[APPELLATE CRIMINAL.]

Before Mr. Justice Kemp and Mr. Justice H. Jackson.

THE QUEEN v. UMESH CHANDRA CHOWDHRY.*

1870
June 4.

Act XXV of 1861, ss. 66, 273, 439—Complaint to be reduced to Writing—Irregularity in the Commencement.

On receipt of a petition from the complainant, the Magistrate, without examining him and reducing his examination into writing, and obtaining his signature thereto, or appending his own signature as Magistrate, referred the petition to a Deputy Magistrate for trial. The Deputy Magistrate tried and convicted the accused.

On a reference from the Sessions Judge, on the ground that the proceedings were irregular under section 66, Act XXV of 1861, and that, therefore, the order of the Deputy Magistrate was without jurisdiction, held, that the petition was sufficient, and that the Magistrate was justified in making over the petition to a Deputy Magistrate, who had the full powers of a Magistrate, for inquiry and trial.

The Queen v. Mahim Chandra Chuckerbutty (1) distinguished.

THIS was a reference to the High Court from the Sessions Judge of Beerbhoom, under section 434 of the Criminal Procedure Code. It was as follows :—

“ The parties in each case presented petitions to the Magistrate of the district who, without examining the parties and reducing the examination into writing, and without obtaining the signatures of the complainants, or appending his own signature as Magistrate, referred the petitions to the Deputy Magistrate for trial, the said proceeding being contrary to the provisions of section 66 (2), Act XXV of 1861. The Deputy Magistrate proceeded to the trial of the cases, and in one case convicted the defendants of rioting under section 147 of the Indian Penal Code and sentenced them to pay fines varying in amount, and in default to undergo rigorous imprisonment for one month. In

* Reference under section 434, Act XXV of 1861, from the Sessions Judge of Beerbhoom, dated the 16th May 1869.

(1) 3 B. L. R., A. Cr. 67; but see the case.

(2) *Act XXV of 1861, s. 66.*—“ When, in order to the issuing of a summons or a warrant against any person for any offence, a complaint is made before the Magistrate of the district, or a Magistrate who is authorized to receive such com-
plaint without reference from the Magistrate of the district, such Magistrate shall examine the complainant. The examination shall be reduced into writing, and shall be signed by the complainant and also by the Magistrate.”

the other case he convicted the defendant under section 379 of the Indian Penal Code, and passed a sentence on the defendant of one month's simple imprisonment.

"Under section 411, Act XXV of 1861, neither of these orders are open to appeal. It is, however, quite clear that the Magistrate acted irregularly in not recording the examination of the complainants as provided for under the provisions of section 66, Act XXV of 1861, nor is it apparent that the Magistrate acted under the provisions of section 66 B, Act VIII of 1869. A ruling of the High Court has also been quoted by the pleader who has requested the reference under section 434, and in which similar proceedings were held to be irregular, viz., the *Queen v. Mahim Chandra Chuckerbutty* (1). According to this precedent, no complaint in either of the cases submitted, having been made within the meaning of section 66, the reference of the cases under section 273 (2), Criminal Procedure Code, by the Magistrate to the Subordinate Magistrate for trial, appears to be illegal, and consequently the proceedings of the Deputy Magistrate being without jurisdiction are, therefore, liable to be quashed, and the defendants discharged. In looking also into the evidence adduced on behalf of the prosecution in either case before the Deputy Magistrate, it can hardly be considered sufficient to substantiate the charge and support the conviction.

"I am well aware that, under section 439, of the Criminal Procedure Code, no trial is liable to be set aside merely for irregularity of procedure, but, under the precedent quoted above, and which appears to be directly in point, I have no alternative but to submit the two cases in question for the consideration and orders of the High Court."

The opinion of the High Court was delivered by

KEMP, J.—In the case referred to by the Judge, there was a statement, but it was not such a statement as to amount to the

(1) 3 B. L. R., A. Cr., 67, but see the division of a district, either on complaint preferred directly to such Magistrate, or

(2) Act XXV of 1861, s. 273.—"Criminal on the report of a Police Officer, may be cases brought before the Magistrate of the referred by such Magistrate to any Magistrate-subordinate to him."

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complaint contemplated by section 66 of the Code of Criminal Procedure.

In the case referred to us, the Magistrate sent the petition presented by the complainant to the Deputy Magistrate who exercises the full powers of a Magistrate. We think that, under section 66 of the Procedure Code, and the Circular Order No. 6, dated 16th May 1864 (1), the Magistrate of the district was justified in making over the petition to the Deputy Magistrate for enquiry and trial.

[FULL BENCH.]

1870

May 11.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Mitter.

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR
(JUDGMENT-DEBTOR) v. BACHARAM HAZRA (DECREE-HOLDER).*

Act XIV of 1859, ss. 20, 22—Limitation—Summary Decision.

An order of a Court dismissing an application for execution of a decree, on the ground that it is barred by the Law of Limitation, is not a "summary decision" within the meaning of section 22, Act XIV of 1859. It is an order within the meaning of section 20 of that Act.

* Miscellaneous Special Appeal, No. 468 of 1869, from a decree of the Officiating Judge of West Burdwan, dated the 31st July 1869, affirming a decree of the Subordinate Judge of that district, dated the 26th June 1869.

(1) The Circular Order contained the following Rules:

2—"A Judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read.

3—"If, after the examination of a witness has commenced, the Judge be compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to.

4—"The examination of a witness shall not be interrupted for the purpose of enabling the Judge to attend to other business, unless such business be of an urgent nature.

5—"If the evidence be not taken down by the Judge, he shall, at the time that the evidence is being given by the deponent, make a memorandum in his own hand-writing of the substance of what each witness deposes. Such memorandum shall be written legibly in the vernacular language of the Judge, or in English, at the option of the Judge, if he is sufficiently acquainted with the language, and it shall be signed by the Judge, and dated, and shall form part of the record, and be always sent up with the record to the Appellate Court in the event of an appeal."

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THE Maharajah Mahtab Chand Roy Bahadur had obtained a decree against Bacharam Hazra, in the Court of the Principal Sudder Ameen of West Burdwan. On the 24th of March 1866, he sought to execute his decree, but the Principal Sudder Ameen dismissed his application as barred by lapse of time.

He appealed to the Judge who, on the 28th November 1866, confirmed the previous decision and again gave costs against the Maharajah. He then appealed to the High Court, and again, on the 24th August 1867, his application was dismissed with costs.

The costs awarded to Bacharam Hazra made him in his turn judgment-creditor to a considerable amount. In June 1869, Bacharam Hazra applied to the Principal Sudder Ameen of West Burdwan to execute his decree for costs.

The Maharaja contended, that as the decision of the High Court was given on the 24th August 1867, the decree-holder should have preferred his petition for the enforcement of his decree within one year from that date, under section 22 of Act XIV of 1859 (1), but that, as he had not done so, process of execution could not issue.

The decree-holder, on the other hand, contended that the decree or order, directing payment of costs to him, was not a summary decision within the meaning of Act XIV of 1859, section 22 (1).

The following issues were tried:—

1st.—Whether the order, under which the decree-holder has applied for costs, could be considered as a summary decision of the Court or not?

2nd.—Whether the suit could be laid under section 20 or 22 of Act XIV of 1859?

The Principal Sudder Ameen held that the order, under which the decree-holder sought to execute his decree for the recovery of costs, could not be called a summary decision under

(1) *Act XIV of 1859 section 22.*— shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application for such execution.”
“No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter, unless some proceeding

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section 22, but that the provisions of section 20 applied to it. He relied upon *Mohan Lal Sukul v. Srimati Ulfutunnissa* (1) and

(1) *Before Mr. Justice Bayley and Mr. Justice Hobhouse.*

MOHAN LAL SUKUL (JUDGMENT-DEBTOR) v. SRIMATI ULFUTUNNISSA (DECREE-HOLDER).*

The 5th February 1869.

Mr. R. T. Allan and Baboo Akhil Chandra Sen for appellant.

Baboo Kali Mohan Dass for respondent.

BAYLEY, J.—This is a special appeal from an order of the lower Appellate Court, holding that section 22 Act XIV of 1859, does not bar the application for execution of the decree which in this case was one for costs.

The facts are that the purchaser of the original decree applied in execution to make one Hashmat Ali, the representative of Hyder Ali, as the son and heir of the latter.

It was held by this Court, on the 19th April 1865, affirming the decree of the lower Appellate Court, dated 16th September 1864, that Hashmat Ali did not inherit the property of Hyder Ali, and so was not the heir, and consequently, not the representative of the judgment-debtor for the purpose of satisfying the petitioner's decree.

In special appeal it is urged that the lower Appellate Court was wrong in stating that Hashmat Ali is not barred by section 22 of Act XIV of 1859, and in considering that the decision of the High Court in *Puresh Narain Roy v. J. Dalrymple* (2) applies to this case. The words of that case are :

"We think that the order for costs made upon a contested matter in exe-

cution of a decree is not of the nature of a summary decision or award, as described in that section, but that it comes within the word 'order,' contained in section 20, the order being made by the Court in the course of executing a decree made in a regular suit."

I think this is a correct construction of the law, and that the proceedings in execution in the present instance were of the character of those ordinarily taken in the progress of a suit towards final decision.

The appeal is, therefore, dismissed with costs.

HOBHOUSE, J.—The applicant in this case was a decree-holder in the year 1833.

In the course of the execution of the decree he applied to enforce it, in accordance, I presume with the procedure laid down in section 216 of the Code of Civil Procedure against Hashmat Ali as the representative of the judgment-debtor Hyder Ali.

On the 16th September 1864, the Judge, in appeal, held that Hashmat was not the representative of Hyder Ali, and gave the said Hashmat Ali costs of the proceeding.

This judgment was upheld in appeal by the High Court on the 19th April 1865, and costs of that Court were also awarded to Hashmat.

On the 30th January 1867 Ulfatunnissa, the representative of Hashmat and the respondent in this Court, applied to execute the orders for costs of the 16th September 1864 and the 19th April 1865.

The order of the High Court of date the 19th April 1865 is an order passed by a Court established by Royal Charter and the provisions of section 22, Act

* Miscellaneous Special Appeal, No. 498 of 1868, from an order of the Additional Judge of Chittagong, dated the 5th September 1868, reversing an order of the Principal Sudder Ameen of that district, dated the 16th March 1867.

Puresh Narain Roy v. J. Dalrymple (1), and stated that the circumstances in the present case were different from those in *Ramdhan Mandal v. Rameswar Bhattacharjee* (2).

This decision was upheld by the Judge, on the 3rd July 1869, who observed :

“ I think the Subordinate Judge is right. I think a question of limitation arising in execution of decree is a contested matter of the nature of that referred to in *Puresh Narain Roy v. J. Dalrymple* (1), and that an order for costs on that contested matter comes under the ‘order’ of section 20 of Act XIV. A late ruling, *Ramdhan Mandal v. Rameswar Battacherjee* (2), is quoted by the appellant, but I think that clearly this quoted case must be held to be of a somewhat different nature from that before me, which I consider analogous to the case of *Puresh Narain Roy v. J. Dalrymple* (1) alluded to above, for I observe that Mr. Justice L. S. Jackson was a Judge in each of the cases quoted ; and had he not considered the cases different, he would hardly have expressed two such contrary opinions. The respondent also quotes a case of 5th February 1869, *Mohan Lal Sukul v. Srimati-Ulfutunnissa* (3), in his favor. I think the weight of High Court Rulings is with the respondents and my own opinion, and, therefore, I dismiss this appeal with costs and interest.”

The Maharaja then appealed to the High Court, on the ground that, under section 22, Act XIV of 1859, the sum XIV of 1859, do not, therefore, apply to such an order, and it is admittedly therefore still in force.

The order of the Judge, dated the 16th September 1864, is an order of a Civil Court not established by Royal Charter, and it is contended for the special appellant that the order is the nature of “ the summary decision or award ” contemplated in section 22, Act XIV of 1859, and that therefore the respondent, not having sued out execution within one year from the 19th April 1865, limitation now bars the execution for the costs given by that order.

The application for execution in this case, I should mention, was of date the 30th January 1867. I agree with Mr. Justice Bayley that the order of the

Judge, of date the 16th September 1864 cannot be said to be in the nature of a summary decision or award, such as for example, an order under Act XIV of 1841, against which an appeal lies in a regular suit in a Civil Court. It is in the nature of an order of a Civil Court having final jurisdiction—a jurisdiction given expressly by the provisions of section 216 of the Code of Civil Procedure. The case of *Puresh Narain Roy v. J. Dalrymple* (1) in which I was one of the Judges, is in point, and governs this view of the case. I agree therefore, in dismissing the appeal with costs.

(1) 9 W. R., 458.

(2) 2 B. L. R., A. C., 235.

(3) See *Ante*, p., 64.

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1870 mary award for costs was barred by lapse of time. Section 20 .
 MAHARAJA had no application to the present case.
 DHIRAJ
 MAHTAB The case was heard by L. S. Jackson and Markby, JJ., who
 CHAND ROY "in consequence of a conflict of opinion between Division
 BAHADUR Benches of the Court in *Mohan Lal Sukul v. Srimati Ulfutun-*
 v. *nissa* (1) *Puresh Narain Roy v. J. Dalrymple*" (2) referred
 BACHARAM the question to a Full Bench, viz. :
 HAZRA.

"Whether the application to enforce an award for costs arising upon a question determined by the Court in execution of a decree comes within the terms of section 22, Act XIV of 1859, or within the terms of section 20."

Baboos Jagadunand Mookerjee and Chandra Madhab Ghose for appellant.

Baboo Rash Behary Ghose for respondent.

The following cases were cited in argument : *Ramdhan Mandal v. Rameswar Bhattacharjee* (3), *Puresh Narain Roy v. J. Dalrymple* (2), *Mohan Lal Sukul v. Srimati Ulfutunissa* (1).

The judgment of the Full Bench was delivered by

COUCH, C. J.—Before we can hold that this order comes within the meaning of section 22, and that the party has only a year to enforce it, we must be satisfied that it is clearly within the meaning of the word "summary." Now it is very difficult to say what is meant by this word or to give a definition which would be applicable in all cases. There are instances in which a proceeding is undoubtedly a summary one. A suit for dispossession within six months is a summary proceeding, that is a summary decision not to be questioned by an appeal ; but the matter of which may afterwards be contested by a regular suit. That shows the nature of a summary proceeding. It is the decision of a Court which hears and determines the matter, but does not finally conclude the parties, a proceeding in which the Court makes an order and determines the matter in issue,

(1) See *Ante*, p. 164. (2) 9. W. R., 458.

(3) 2 B. L. R., A. C., 235.

if I may so describe it for the present occasion, in order to prevent some mischief which might ensue, if there was not a mode of coming to some decision at once in the matter. It may also be that by a summary proceeding is meant one where no appeal lies, and where the decision of the tribunal which hears and determines the matter is final. I think the present is a case in which it is impossible to say that the proceeding is a summary one within the meaning of section 22; it is an order made by a Court in the exercise of its jurisdiction in the execution of the decree in a suit,—an order by which the execution-debtor was declared entitled not to have the decree executed against him because it was barred by the Law of Limitation, and having succeeded in that he was awarded his costs. I think that cannot be considered as a summary decision or award within the meaning of section 22. It is an order within the meaning of section 20. It does not appear to me when the cases come to be examined that there is any real conflict of decision between them.

I think the two decisions in *Puresh Narain v. J. Dalrymple* (1) and *Mohan Lall Sukul v. Srimati Ulfutunissa* (2), are correct, and that we should adopt them. The appeal will be dismissed with costs.

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[APPELLATE CIVIL.]

Before Mr Justice Bayley and Justice Sir C P Hobbhouse, Bart.

KHETRA MOHAN BABOO (PETITIONER) *v* RASHBEHARI B.A.
BOO (OPPOSITE PARTY).*

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March. 4.

Act XVI of 1864, s 51—Act XX of 1866, s 53—Act VIII of 1859, s 194
—Registration—Bond—Power of Court to alter terms of a Specially Registered Bond,

By a bond specially registered under Act XVI of 1864, the obligor stipulated to pay the entire amount secured thereby, with interest at the rate therein mentioned.

*Rule Nisi, No 177 of 1870

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on a day therein mentioned. There was a further stipulation that, on default of payment the bond was to be enforced as a decree. On failure of payment the obligee applied for execution under section 53, Act XX of 1866 but the Subordinate Judge ordered the payment to be made by instalments. On an application to the High Court under section 15 of the Charter Act, held, that the Subordinate Judge had no jurisdiction to pass a decree on the bond altering or varying its terms. Section 194 Act VIII of 1859 did not apply.

Khettra Mohan Baboo petitioned the Court as follows :

" Rashbehari Baboo and Surju Kumari Bibi executed to your petitioner a bond, dated the 18th Bhadra 1272 (September 2nd 1865) for rupees 4,000, with an agreement therein that, on failure to pay the entire amount with interest at 12 per cent. per annum, by Sraban 1276 (July and August 1869,) the same would be recovered without a suit. The bond was duly registered under the provisions of section 51 of Act XVI of 1864, on the 2nd September 1865.

" The said persons having failed to liquidate the entire amount with interest, as stipulated, your petitioner applied to the Subordinate Judge of Burdwan on the 1st of August 1869, for enforcement of the bond under Act XX of 1866.

" The Subordinate Judge, in violation of the express terms of the bond, has (on 2nd October last) ordered the amount remaining unliquidated (deducting sums previously paid, and a sum of rupees 1,044 deposited in Court as interest) to be paid by instalments, with interest, from the date of petition, at the rate of 6 per cent. per annum.

" The Subordinate Judge had no Jurisdiction or power to alter or vary the express terms of the bond, and order the amount due to your petitioner to be paid by instalments, and at a lower rate of interest than that stipulated.

" The order of the Subordinate Judge is, on the face of it, illegal and inequitable, and also in contravention of the spirit and object of the Registration Law.

" Your petitioner, therefore, prays, that the order of the Subordinate Judge may be annulled, so as to make it consonant to the express stipulations in the bond."

A rule nisi was, accordingly, granted to the petitioner calling upon " the other side to show cause, within fifteen days from the date of the service of notice upon him, why the Subordinate

Judge's order of the 2nd October 1869 should not be set aside as having been passed without jurisdiction."

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Baboos *Ashutash Dhur* and *Upendra Chandra Bose*, for Rashbehari Baboo, shewed cause. They contended that, for the enforcement of the agreement in the bond, a decree must be obtained ; and if the Court had jurisdiction to pass a decree, it had jurisdiction to order that the amount for which it was passed should be paid by instalments, as provided by section 194 of Act VIII of 1859.

Baboo *Chandra Madhab Ghose* in support of the rule.—The object of the Registration Law was to give speedy remedy to lenders of money in realizing their dues, and the very object of the law would be frustrated if the contention of the opposite side were to be adopted. Under section 53 of Act XX of 1866, the obligee is entitled to a decree in the terms of the bond. The Code of Civil Procedure only applies to the enforcement of decrees under this section.

BAYLEY, J.—The petitioner, Khettra Mohan Baboo, applied, on the 21st December 1869, praying that the order of the Subordinate Judge of Burdwan, dated the 2nd October last should be annulled and made consonant with the express stipulations in the bond to which his petition referred.

The opposite party was called upon to shew cause, and the case has accordingly, been this day heard in the presence of the vakeels of both parties.

The admitted facts of the case are these :—

A bond for rupees 4,000, dated the 18th Bhadra 1272 (September 2nd 1865), was executed, by Rashbehari Baboo and Surju Kumari Bibi, in favor of the petitioner. It was agreed therein that on failure to pay the entire amount, with interest at 12 per cent. per annum by Sraban 1276 (July and August 1869) the same would be recovered without a suit. The words were “*ভিক্তি জারি হইবেক*.”

The bond was registered under the provisions of Act XVI of 1864, on the 2nd September 1865. The money not having been paid as stipulated, the obligee applied to the Subordinate Judge of Burdwan, on the 1st August 1869, for the enforcement

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of the bond, under the provisions of the then procedure law in regard to registration,—viz, Act XX of 1866. The Subordinate Judge directed that the amount remaining unliquidated be paid by instalments, with interest at the rate of rupees 6 per cent. per annum.

The question to be determined is, whether the Subordinate Judge had jurisdiction to alter the express terms of the bond, and direct that the amount covered thereby should be paid by instalments, and at a lower rate of interest than that stipulated.

With regard to the question of interest, it is admitted by the opposite party that he is ready to pay it at the rate specified in the bond, viz at the rate of rupees 12 per cent. per annum, up to the date of the decree.

On the other point, viz., whether the Subordinate Judge had jurisdiction to make the bond payable by instalments, I am of opinion that he had not. It would appear that the Subordinate Judge had in view the provisions of section 194 of Act VIII of 1859, which enacts that the Court may, for any sufficient reason, order the amount of a decree to be paid by instalments with or without interest. But that relates to the procedure in execution of an ordinary decree, and not to the specific terms of the Registration Law, section 51 Act XVI of 1864. It may be added that section 194 Act VIII of 1859, looks to the terms in which a decree may, at the discretion of the Court be made, and not as to the enforcing or the execution of that decree. Section 51, Act XVI of 1864, however provides, “ whenever the parties to a
“ bond or other written obligation, for the payment of money,
“ shall, at the time of registering the same under the provisions of
“ this Act, apply to the District Registrar or Deputy Registrar to
“ record their agreement, that in the event of the bond, or other
“ obligation as aforesaid, not being satisfied within the time stipu-
“ lated, the amount may be recovered as hereinafter provided with-
“ out a suit, it shall be the duty of the District Registrar or Depu-
“ ty Registrar, after making such enquiries as he may think proper,
“ to record such agreement at the foot of the endorsement required
“ by section 36 and such record shall be signed by the Dis-
“ trict Registrar or Deputy Registrar and by the parties to the
“ bond, or other written obligation as aforesaid.” Now it is admit-

ted that the bond itself declared that the money should be realizable without a suit, and that the parties proceeded to record the agreement under the terms of that section. Then, looking to the terms of section 52, we find that " a bond or other obligation for the payment of money registered, with such agreement " as in the last preceding section mentioned, may be enforced " without a suit by any Court which would have had jurisdiction " to try a suit on such bond or other obligation for the recovery of the amount," &c. Now the bond was registered under the terms of section 51, Act XVI of 1864. But the law which was in force at the time when money became recoverable on default of payment at the time stipulated, was Act XX of 1866. Section 3 of Act XX of 1866 maintains transactions done under Act XVI of 1864; but some alteration is made by the latter law as to the procedure, for section 52 of that Act provides that " whenever the obligor and obligee " of an obligation shall agree, that, in the event of the " obligation not being duly satisfied, the amount secured " thereby may be recovered in a summary way, and shall, at the " time of registering the said obligation, apply to the registering " officer to record the said agreement, &c., the registering officer, " after making such enquiries as he may think proper, shall " record such agreement at the foot of the endorsement " &c., &c. Then section 53 of the same Act provides,—" on production " in Court of the obligation and of the said record signed " as aforesaid, the petitioner shall be entitled to a decree for " any sum not exceeding the sum mentioned in the petition, " together with interest at the rate specified (if any) to the date " of the decree, and a sum for costs to be fixed by the Court." It is clear from the terms of sections 51 and 52, Act XVI of 1864, that the bond was to be enforced without a suit. Nothing can be clearer than the terms of the agreement on this point. There is then, I think, under the laws cited, no power in the Subordinate Judge to alter the terms of the agreement as contained in that bond. It becomes of itself a decree, and under the terms of the law such a decree is not capable of variation in the making or in the execution of it. The bond specifies that if the money be not paid within the time stipulated, the bond is to be enforced

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as a decree(“ ডিক্রি জারি হইবেক.”) and being so enforced, the property of the debtor, &c., shall be attached and sold.

In this view I am of opinion that it was beyond the power of the Subordinate Judge to do otherwise than accept the bond so registered under the provisions of sections 51 and 52, Act XVI of 1864, as a final decree, as it stood, and not as one as to which he could make the amount payable by instalments, or lower the rate of interest stipulated.

I would, therefore, reverse the order of the Subordinate Judge and remand the case to him, that he may dispose of it according to this view of the provisions of sections 51 and 52, Act XVI of 1864, and of section 52, Act XX of 1866. The petitioner must get his costs of this Court.

HOBHOUSE, J.—I agree in the order that Mr. Justice Bayley has passed in this case. I remark that the bond in this instance was specially registered under the provisions of section 51, Act XVI of 1864; and that, in accordance with the rules for such special registration, an agreement was recorded that, in the event of the bond not being satisfied within the time stipulated, the amount was to be recovered, as hereinafter provided, without a suit. Then the hereinafter provision is to be found in section 52 of the same Act. That section provided that the bond should “ be enforced without a suit by the Court having jurisdiction to try such a suit,” and it further provided that the bond should be enforced as a decree in a suit, “ under the rules applicable to the execution of decrees in the Court having jurisdiction.” There was a further provision shewing how an application for the enforcement of the bond was to be made. But Act XVI of 1864 was repealed by Act XX of 1866, except as is provided by section 3 of the last Act, “ as regards things duly done ” under the first Act. Then by section 53, Act XX of 1866, it is provided that the obligee of any such bond as we have been discussing (*i. e.*, a bond which shall have been specially registered, whether under Act XVI of 1864 or under this Act,) must, before he could act upon the bond, present a petition to the Court which had jurisdiction to try the question of the bond. Then when this petition had been presented, there is further laid down under this section a procedure by which, on the pro-

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duction of the obligation and of the agreement, the petitioner is declared entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified in the bond to the date of the decree. The bond, therefore, in this instance, would, by an act duly done under the provisions of Act XVI of 1864, have been held to have the force of, and to be enforceable as, a decree, the full amount of which was declared to be due, and to be capable of execution as if it had been a decree, provided only that the amount of the bond was not satisfied by a certain day. These were the provisions of Act XVI of 1864. The amount of the bond was not satisfied on the date specified, and therefore, by the provisions of that Act, from the moment of such non-satisfaction, the bond, it seems to me, must have been held to be a document which would have been at once capable of execution as if it were a decree in the Court having jurisdiction to execute such decree. But by the provisions of Act XX of 1866 the procedure seems to have been somewhat altered. The petitioner could not at once, it seems to me, with reference to the provisions of that Act, apply for the execution of the bond as if it were a decree, but he was bound, in the very words of the Act, and with reference to the special agreement entered into in the matter of the bond, to produce the bond before the Court; and although he was then entitled to a decree for the amount due upon the bond, still he could not recover that amount until the Court had actually given him a decree. But the Court, in my judgment, was not the less bound to give him a decree in the words of the bond. The bond said that if the amount of it was not paid by a certain date, the whole amount was to be considered due. The Court, therefore was, it seems to me, bound to declare such amount due, and had not jurisdiction to declare that such amount should be paid by instalment, instead of declaring that it should be paid all at once.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Kemp.

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May 6.

MULLICK KURIM BAKSH (DEFENDANT) v. HARRIHAR MANDAR
AND ANOTHER (PLAINTIFFS).*

User, Right of—Enjoyment, Period of, sufficient to create a Right of User.

There is no rule of law that a certain period of enjoyment is required to establish the right of user.

THIS was a suit for the declaration of right to the use of the water of a certain *Daur*, or watercourse, for irrigating the plaintiffs' land, and for the removal of an obstruction put upon it by the defendant. The defendant stated that he had not obstructed the watercourse, and that the plaintiffs had no right to the water for the purpose of irrigating their land.

The Moonsiff held that the plaintiffs had a right to irrigate their land from the watercourse in dispute, and that the defendant had interfered with the same by having placed a bund over the course. He, accordingly, passed a decree in favor of the plaintiffs with a declaration that the parties, plaintiffs and defendant, should make an alternate use of the water of the channel.

On appeal the Subordinate Judge confirmed the judgment of the Moonsiff, holding that the evidence in the case proved that for a long time the lands of the plaintiffs had been irrigated with the water of the channel in dispute, but declared that the word "alternate" in the decree of the Moonsiff meant that the defendant should use the water, and then, after him, the plaintiffs.

The defendant appealed to the High Court.

Mr. Gregory (Munshi Mahomed Yousaf with him) for the appellant.

Baboo Ramesh Chandra Mitter for the respondent.

The judgment of the Court was delivered by

COUCH, C. J.—The Court has found in this case that there had been an enjoyment for a long time, and, consequently, that

* Special Appeal, No. 2806 of 1869, from a decree of the Officiating Subordinate Judge of Bhaugulpore, dated the 18th June 1869, affirming a decree of the Moonsiff of that district, dated the 3rd March 1869.

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the plaintiff had established his right to the use of the water. Now I think we must understand the expression "for a long time" as such a length of time as satisfied the Court that there was a right. No precise period of enjoyment can be said to be required in order to prove the existence of a right of this kind; it is a matter for the Court to determine whether the use has been for such a length of time as to satisfy it that there is a right to it. The cases, as far as I am aware on this side of India, do not go beyond that. The question whether a Judge is bound upon proof of a certain period of user to find that there is a right is a different one from that of whether a Judge - who has found a right was justified in doing so. There seems to be no rule of law which says that a certain period of enjoyment is required to establish the right, and therefore, in this case, as the lower Court has found that there has been a use for a very long time, there is no objection to the finding in point of law. With regard to the other question, the plaintiff alleged in his plaint that he had been obstructed in his enjoyment of his right to the water by the erection of a bund. The lower Courts have found that the right, which the parties had, was that the defendant could make use of the water, and that after that the plaintiff would have the right to use it. That is the view which the lower Appellate Court took of the decree of the Moonsiff. It may be that it will, on some occasions, be difficult to carry out this decree, and that at times disputes may arise between the parties as to whether the defendant has not done more than exercise the right to which he is so entitled, but that is a difficulty which is inherent in the case, and the nature of the rights possessed by the parties. If at any time the defendant makes use of the water to a greater extent than he has a right to do, and deprives the plaintiff of what he is really entitled to; the question will have to be tried in another suit. It is to be hoped, however, that a right having now been declared, the parties will exercise it in such a way as not to cause any further litigation. The only question which remains to be determined is whether it is proper to allow the decree of the Moonsiff to stand with the construction which has been put upon it in the judgment of the Subordinate Judge. The Subordinate Judge says,"I

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dismiss the appeal and I uphold the decision of the Moonsiff as construed by me."

It would be better that he should alter the Moonsiff's decree according to what he says is the proper construction of it, so as to make the right declared more defined and precise, but the parties may make an application to him to amend his decree and to word it so that it may be in accordance with what he holds to be the proper construction of the lower Court's decree. It is not a matter for which a special appeal was necessary, and therefore this appeal must be dismissed with costs.

Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

LALIT PANDAY (DEFENDANT v. SRIDHAR DEO NARAYAN SING (PLAINTIFF).*

1870
 May 18.

Hindu Law—Part of Money borrowed paid in relief of Legal Necessity—Mortgage Deed.

The daughter of a Hindu, while in possession of the paternal estate, borrowed a large sum of money under a mortgage of a portion of the estate. Part only of the money borrowed was devoted by her to the relief of legal necessity. After her death, the next heir sued the mortgagee to recover the property mortgaged, and to set aside the mortgage deed. The Courts below gave a decree for possession to the plaintiff, upon re-payment of the amount actually spent in the relief of legal necessity. Such decree upheld on appeal.

THE plaintiff, Baboo Sridhar Deo Narayan Sing, sued to recover possession of a 4-anna share of the property in dispute, by setting aside a deed of *zur-i-peshgi* executed, while in possession of the paternal estate, by Mussamat Sheoraj Koer, the daughter of Tulsi Narayan, deceased, in favor of the defendant, dated 19th August 1863, for the sum of rupees 9,500. Mussamat Sheoraj Koer died in 1865. The plaintiff claimed as legal heir of Tulsi Narayan. The main point in the case was whether or not the mortgage deed could be held valid when the money borrowed by Mussamat Sheoraj Koer, a Hindu widow, the mortgagor, had been applied, in part only, to the discharge of such legal necessities as would justify the alienation.

* Special Appeal, No. 2738 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 31st July 1869, affirming a decree of the Moonsiff of that district. dated the 29th December 1868.

On the facts, the Court of first instance held that it 1870
 was clear that, out of the sum of rupees 9,500 borrowed by LALIT PANDAY
 Sheoraj Koer, rupees 6,921 and 5 annas was applied to the SRIDHAR DEO
 relief of legal necessity; that "the plaintiff and the property NARAYAN
 "in dispute must be liable for" the last-mentioned sum, "and SING.
 "not for the remaining rupees 2,578-11, which was borrowed
 "and appropriated by Sheoraj Koer during her life-time." He ordered "that the suit be decreed to the effect that
 "the disputed deed of *zur-i-peshgi*, dated 19th August 1863,
 "executed by Sheoraj Koer, be confirmed in respect of rupees
 "6,921-5, and cancelled in respect of the sum of rupees 2,578-11.
 "The plaintiff can, if he be so advised, take possession of the
 "property in dispute on paying rupees 6,921-5; that until the
 "above sum is paid, the answering defendant will continue
 "in possession of the property in dispute under the said deed
 "of *zur-i-peshgi*; that one-fourth of the costs incurred by the
 "plaintiff will be borne by the answering defendant, and three-
 "fourths of the costs incurred by the defendant will be borne
 "by plaintiff."

The defendant appealed to the Subordinate Judge, who "saw
 "no reason whatever to interfere" with the above decision.

The defendant then appealed specially to the High Court on
 the grounds, *inter alia*, that it being evident that the major
 portion of the money was borrowed under legal necessity, the
zur-i-peshgi deed must be upheld in its entirety; that the
 defendant who had advanced the money *bona fide*, after making all
 proper enquiries as to the existence of legal necessity, could
 not be prejudiced by this claim of the reversioner.

Munshi Mahomed Yusaff, for appellant, cited the cases of
Hanooman Persaud Panday v. Mussamut Babooes Munraj
Koonwaree (1) and *Rajaram Tewari v. Lachman Prasad* (2).

Baboo Tarack Nath Dutt for respondent.

The judgment of the Court was delivered by

LOCK, J., (who after briefly stating the facts continued):—
 The first ground taken in special appeal related to the parties

(1) 6 Moore's I. A., 359.

(2) 4 B. L. R., A. C., 118.

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being legal heirs of the deceased, Tulsi Narayan. As, however, this point was not urged in the lower Appellate Court, and is a question of fact, we cannot allow it to be urged now. Secondly, that as the Courts have found that there was a legal necessity, the deed should have been held good in its entirety; and, thirdly, that the mortgagee having enquired and used due precaution to ascertain the existence of the necessity, he cannot be prejudiced by the manner in which the money was spent.

The pleader for the special appellant has endeavored to show us that, whether the transaction be one simply creating a lien, or whether it be one absolutely transferring the proprietary right to another, the law in either case is the same. We think, however, that there is a great difference between the two cases. The decisions quoted to us by the pleader for the appellant all relate to cases of sale, and are, therefore, not applicable to the case before us. Where it is found necessary to create a mortgage, it is clearly the duty of the party borrowing the money, if that party has but limited interest, to borrow only to the extent of that necessity. He has no right to create a lien upon the property larger than that which is needful to remove the pressing necessity: and the lender, when making enquires, is bound, it appears to me, to ascertain what is the extent of that necessity before making the loan. It would be no good answer if a lender were to say "it was proved to me that there was a necessity for rupees 500, and therefore I have lent rupees 2,000." The lender can only be protected if he has ascertained the extent of the necessity and lends money up to that extent only (1).

With regard to the third objection taken, no doubt that was the point which should have been enquired into. But the special appellant did not put it in issue, and it appears to me that it is now too late to raise this objection, and ask us to send the case back for a re-trial on this point.

We think, therefore, that the special appeal should be dismissed with costs.

(1) On this point see *Rajaram Tewari* 118. Particularly the remarks of *PEA-v. Lachman Prasad*, 4 B. L. R., A. C., 100, C. J., pp 125 *et seqq.*

[IN THE INSOLVENT COURT.]

Before Mr. Justice Norman.

IN THE MATTER OF RAMSEBAK MISSER.

1870
May. 26.11 & 12 Vict., c. 21, s. 73—Act VIII of 1859, s. 342—Appeal from.
Commissioner of Insolvent Court.

Section 342 of Act VIII of 1859 does not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. The right of appeal is given by section 73 of the Indian Insolvent Act, and the Court cannot impose on the appellant a condition that he shall give security for the costs of such an appeal.

See also
15 B. L. R.
App. 11.

THIS was an application that security might be given for the costs of an appeal, which had been preferred by certain persons from an order of Mr. Justice Phear sitting as Commissioner of the Insolvent Court. The application was supported by the affidavit of A. B. Miller, Official Assignee, and was made on his behalf.

Mr. *Ingram*, for the Official Assignee, contended that the appeal was to be governed by section 342 of Act VIII of 1859. He referred to the cases of *Monohur Doss v. Khodrum Begum* (1), *Cazee Muzhur Hossain v. Denobundo Sen* (2) &

Mr. *Woodroffe contra*.—Section 342 does not apply to appeals from orders of a Commissioner of the Insolvent Court. Such appeals are governed by section 73 of the Indian Insolvent Act—*In re Gholam Rasul Khan* (3). The Insolvent Court has a totally distinct jurisdiction. It is not mentioned in the Charter which gives jurisdiction in other respects; and section 18 of the Letters Patent, 1865, the only provision with respect to Commissioners in insolvency, provides that they shall exercise their powers under the law for insolvent debtors, which is the Indian Insolvent Act, 11 & 12 Vict., c. 21. The appeal lies to the High Court as a Court administering the Insolvent Act. An analogous case is that of appeals under section 15 of

(1) Bourke's Rep., 110.

(2) *Id.*, 119; S. C., on appeal, *Id.*, A. O. C., 40

(3) 1 B. L. R., O. C., 130

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the Charter, of which it has been held, in the case of *Roy Nandipat Mahata v. Alexander Shaw Urquhart* (1), that the ordinary rules of appeals do not apply to them, but they are confined to the point on which the Judges differ.

Mr. Ingram in reply.—Section 73 gives an appeal to the Supreme Court, now the High Court; but on appeal the cases are to be governed by the procedure under Act VIII of 1859. [NORMAN, J., referred to the wording of Rule 2, on page 92 of the Appendix to Broughton's Act VIII of 1859, in which the Insolvent jurisdiction is not mentioned (2).] That shows that the Insolvent jurisdiction was the same as that under Act VIII, and that the others mentioned there were different.

NORMAN, J.—It appears to me that Mr. Woodroffe's argument is unanswered. The appeal from an order of a Commissioner is given by section 73 of the Insolvent Act, and no law or practice of the Court has been shown which qualifies that right, or which brings such an appeal under section 342 of Act VIII of 1859. It appears to me that that section does not apply to appeals from a Commissioner of the Insolvent Court. The costs of this application to be those of the appellants if they succeed in the appeal.

(1) 4 B. L. R., A. C., 781.

or Matrimonial Jurisdiction, shall be re-

(2) "The procedure in civil cases, which shall be brought before the Court in the exercise of its admiralty, Vice-Admiralty and Act XXIII of 1861."

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Mitter

MUSSAMAT JAI BAN-I KUNWAR (ONE OF THE DEFENDANTS)

v. CHATTAR DHARI SING (PLAINTIFF.)*

1870
April 26.

Hindu Law—Gift—Religious Endowment—Trustee with Power of Appointment—Deed of Endowment—Failure to appoint new Trustees—Reversion to the Heirs of the Endower.

A., a Hindu, by a deed of *wakf-nama* (deed of endowment), after reciting that he had "erected and prepared a *thakurbari* (temple) and the image of *thakar* (idol) and also a *sadavari* (Alms-house) and had, in way of *wakf* (endowed property) dedicated certain property for the performance of the *puja* (worship) of the said *thakar* and repairing of the house, flower garden and *thakurbari*, and appointed his sister B., the manager and *matwali* (trustee) of the same, authorised B. to spend the profits in the performance of the *puja*, &c. As for the future she (B.) should appoint such person to be the manager and *matwali* as may be found by her to be fit, &c. and in like manner all successive *matwalis* should have right of appointing successively *imatwalis*. To these his heirs should not have right to prefer any claim, &c." B died without having appointed any *matwali* (trustee) to succeed her in the management of the trust. On a suit by the heir of B. to obtain possession of the property covered by the deed against the heirs of A., Held, that the managership, on failure of appointment of a trustee, reverted to the heirs of the person who endowed the property.

ONE Baboo Harprasad Sing, by the following deed of *wakf-nama*, dated 14th March 1851, conveyed to his sister Mussamat Deojani Kunwar certain parcels of property for certain religious and charitable purposes:—

"I am Baboo Harprasad Sing, son of Baboo Bunyad Sing, by caste Brahmin, zemindar, inhabitant and owner, mohkurraridar of Mauza Amuna, Pergunna Arwal, Zilla Behar.

"Where as there is no certainty in the life of man, I, therefore, having, with the view of obtaining the blessings of the future world, erected and prepared a *thakurbari* in the said mauza and the image of Thakur Jankinathji and also

* Special Appeal, No. 2426, from the decree of the Officiating Judge of Gya, dated the 21st June 1869, reversing the decree of the Principal Sudder Ameen of that district, dated the 20th August 1867.

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" a *sadavart*, have (in the way of *wakf*) dedicated the whole
 " and entire 6-anna odd share of the *milkiat* (proprietary)
 " and Mokurrari land out of the whole 16 anna of Mauza
 " Dindirmani and hamlet, the Nizamat land in Pergunna Arwal,
 " appropriated and held by me, with all rights, &c., everything
 " connected with it, with the exception of those exempted by
 " law, from 1259 F. (1852) for the performance of the *pūja* of
 " the said *thakur* and repairing of the house, flower garden, and
 " *thakurbari*, and appointed Mussamat Deojani Kunwar, daughter
 " of Baboo Bunyad Sing, and the sister of mine, as a manager
 " and *matwali* of the same. It is necessary that the said
 " Mussamat having remained in possession of the said share of
 " the mauza, shall, after paying the Government revenue and the
 " expenses of the village; &c., spend the profits in the performance
 " of the *pūja* of the *thakurbari* and repairing of the temple,
 " and payment, defraying of the expenses of the same, together
 " with the salaries of the servants and *pujari* (priest). As for
 " the future she should appoint such person to be the manager
 " and *matwali* as may be found by her to be fit, intelligent, and
 " honest, and in the like manner all the successive *matwalis*
 " shall have the right of appointing successively *matwalis*. To
 " these my heirs and representatives have not, and shall not have
 " the right to prefer any claim, objection and dispute, and accord-
 " ingly these few words have been executed in the way of a
 " *wakfnama*, so that it may be of use at the time of need. The
 " 14th March 1851."

He also executed, on the same date, a deed of *bakhshishnama*, or deed of gift, absolutely conveying certain parcels of property to Deojani. Deojani died, and Chattardhari Sing, the brother of Deojani's husband, sued the widows of Harprasad, for possession amongst others of the property covered by the said deed, as the heir and legal representative of Deojani under the Hindu law, and which had been withheld from him by the defendant.

The defence set up was (*inter alia*) that the endowed property was not the *stridhan* of Deojani, and was not therefore subject to the law of inheritance.

The Subordinate Judge held, that the law of inheritance did not apply to the lands endowed for charitable purposes, and that

the heirs of the donor were entitled to act as the managers thereof. He, accordingly, dismissed the claim for the property covered by the deed of endowment.

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On appeal, the Judge found, from the circumstances of the case, and the terms of the deed, that Harprasad meant to make over the property to Deojani absolutely, with the service attached to it of performing certain worship, and keeping up certain temples. He, accordingly, passed a decree in favor of the plaintiff.

The defendants appealed to the High Court.

Baboos Anukul Chandra Mookerjee and Chandra Madhab Ghose, for the appellants, contended that, as Deojani had died, without having made an appointment in terms of the deed, the office of *sebat* would go to the heirs of the donor, and not to the heirs of the first *sebat*. There was no absolute gift to Deojani. She was merely a manager or trustee, with power to appoint future trustees. She has failed to carry out the power. The trust reverts to the donor or his heirs.

Mr. *Twidale* (Mr. *Gregory* with him) for the respondent contended that failure to make an appointment could not go against Deojani's heirs. There was an absolute appointment under the deed.

BAYLEY, J.—In these cases one Harprasad is admittedly the original owner of the property. The plaintiff, Chattar Dhari Sing, is the brother of the husband of Deojani, a sister of the said Harprasad, and sues as her heir, on the ground that she (Deojani) had derived the properties in suit from her brother, the said Harprasad. The defendants, special appellants, before us, Jaibansi Kunwar and Pit Kunwar, are widows of the said Harprasad.

It appears that Harprasad executed two deeds; one a *bakhshishnama*, and the other a *wukfnama*, dated the 14th March 1857, passing certain properties to Deojani. In regard to the *bakhshishnama*, both the Courts below have decreed the plaintiff's suit, and the defendant, Jaibansi Kunwar, special appellant, in case No. 2426, does not take any objection to this part of the lower Appellate Court's judgment.

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We now come to the deed of *wukfnama* of the same date. That is a deed which makes Deojani *matwali* (trustee) of certain properties allotted for the maintenance of the worship of *thakur* (idol), and *thakurbari* (its temple). One of the conditions in that deed is, that each successive *matwali* shall have the power of appointing each his successor, but it makes no provision, in case there should be failure in such nomination. It so happens in this case that Deojani died without nominating any successor, and the plaintiff sues, as heir of Deojani, to enforce his right of succession.

Now the real test of the plaintiff's right in this matter is to see how Deojani received the property. Now Deojani did not receive the property by any right of inheritance, purchase, or co-parcenary; but as the property of the idol, endowed by Harprasad, of which she was by the terms of the deed and the nature of the endowment, simply made a *matwali*. As before observed, one of the provisions of the trust failed, so far as it regarded the nomination by Deojani as *matwali* of a successor to that office, but the property is always the property of the idol under the management of the *matwali*; and in that view, the managership must revert to the heirs of the person who endowed the property.

In this view we hold that, as regards so much of the property, as is concerned by the *wukfnama*, the judgment of the lower Appellate Court must be reversed, and the plaintiff's suit dismissed.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

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March 7.

TARINI PRASAD GHOSE (DEFENDANT) v. KHUDUMANI
DEBI (PLAINTIFF).*

Act VIII of 1859, s. 7—Cause of Action.

At a sale for arrears of rent, A. became the purchaser of a certain patni talook. B., whose patni right had been sold, sued for and obtained a decree for reversal of the sale on the ground of irregularity. In the meantime, A. had committed default, and the patni was again sold for arrears of rent. The zemindar drew out from the Collectorate the amount due to him. C., who had bought B.'s

* Regular Appeal, No. 87 of 1869, from a decree of the Subordinate Judge of Nuddea, dated the 25th February 1869.

right, title, and interest in his decree, now sued A. for recovery of the surplus proceeds of sale in the hands of the Collector, and obtained a decree. He afterwards sued A, for mesne profits for the time which he was in possession of the patni talook. This was a suit by C. against A. for recovery of the amount drawn out by the zemindar, on the ground that, in consequence of A. having collected the rents from the talook, which were to go towards payment of the rent due to the zemindar, and having fraudulently withheld such payment, he had sustained damage to the extent of the amount taken by the zemindar.

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Held, that the suit was barred by section 7, Act VIII of 1859.

Sabheer Khan v. Kallí Doss Dey (1) distinguished.

THIS was a suit for recovery of damages. The plaint stated that a patni mehal, called Pergunna Plassey and Dehi Mogul-parra, was, on the 2nd Jaisti 1265, B. S. (15th May 1858), sold for arrears of rent due to the zemindar, and purchased by the defendant; that in a suit by the patnidars to set aside the sale for irregularity, the sale was, by a decree of the Judge of Nuddea, set aside, which decree was confirmed by the High Court on the 30th June 1863; that pending these proceedings, the defendant, although he had collected the rents from the ryots, failed to pay rent to the zemindar, and the patni mehal was, on the 2nd Jaisti 1269 B. S. (15th May 1862), again sold and purchased by one Rakhalidas Mookerjee, for rupees 98,000; that the zemindar drew out rupees 36,111-2-8 in satisfaction of rent and interest due to him, and a sum of rupees 980 was deducted on account of fees due to Government; that there was a balance of rupees 60,908-13-4 out of the proceeds of sale of the said mehal; that the right, title, and interest of the said decree-holders of and in the decree setting aside the sale being sold in execution of another decree which had been passed against them, the plaintiff had become the purchaser thereof. And the plaintiff claimed that, inasmuch as the defendant, having collected the rent due from the ryots had fraudulently withheld payment of rent to the zemindar, she (the plaintiff) was entitled to recover from the defendant the amount of rent and fees which had been deducted from the proceeds of sale as a special loss to him.

The defence was that the plaintiff had brought a suit against the defendant to obtain the surplus proceeds of sale of the patni talook which remained in the hands of the Collector after

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payment of the rent due to the zemindar, and had obtained a decree therefor; that she had also brought a suit against the defendant for recovery of the mesne profits of the patni mehal during the time he had been in possession; that, inasmuch as she had not included the present claim in either of those suits, she must be held to have relinquished her present claim.

The Subordinate Judge held that "the cause and aspect of the suits, which had been preferred for obtaining the surplus proceeds of sale and mesne profits, were not based upon the same cause of action; that in the suit for the surplus proceeds of sale, the co-sharers had been made defendants, and no liability attached to them; that the issues in the present case were different; that the present case was wholly different; that in this suit a single individual had been made defendant; that the issues were unlike." He cited *Sabheer Khan v. Kali Doss Dey* (1), and passed a decree in favor of the plaintiff.

The defendant appealed to the High Court.

Baboo Hem Chandra Banerjee, for the appellant, contended that the plaintiff having omitted to include the present claim in her former suits, she was precluded from now suing—Section 7 (2), Act VIII of 1859. The cause of action was the same. The original claim was for a portion only of the proceeds of sale. The present claim, although brought under color of a suit for damages, is virtually a claim for another portion of the proceeds of sale which had been taken away by the zemindar; the cause of action was the sale of the talook, and the subject of all the suits is the proceeds of such sale. The suit cannot, therefore, lie.

Baboo Ramesh Ghandra Mitter, for the respondent, contended that the two suits did not arise on the same cause of action. The suit for surplus proceeds of sale was not in consequence

(1) 1. W. R., 199.

(2) Act VIII of 1859, s. 7—"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit with-

in the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.

of any default of the defendant, but merely because the plaintiff's name had not been registered as a proprietor in the Collector's books, and the Collector had refused to pay her. The defendant did not withhold her claim. The cause of the present action is the withholding of a right and a denial of a claim by the defendant. Here the defendant had refused to make good to the plaintiff the loss which she had sustained in consequence of her money having been applied in liquidation of a debt justly due from the defendant.—*Sabheer Khan v. Kalli Doss Dey* (1) was in point.

The judgment of the Court was delivered by

JACKSON, J.—The present case resembles in many points that of *Tarni Prasad Ghose v. Raghab Chandra Bandopadhyaya* (2)

(1) 1 W. R., 199.

(2) Before Mr. Justice L. S. Jackson
and Mr. Justice Glover.

TARINI PRASAD GHOSE (DEFENDANT)
v. RAGHAB CHANDRA BANDOPADHYA (PLAINTIFF).*

21st February 1870.

Baboo Hemchandra Banerjee for appellant.

Baboo Ashutash Chatterjee for respondent.

The judgment of the Court was delivered by.

JACKSON, J.—It seems to me quite unnecessary to go beyond the first two points which have been raised in this appeal.

The plaintiff's claim in this case, as set forth in his plaint, appears to me to be one of the most monstrous that I have ever heard of. On account of default in the payment of rent to the zemindar by several co-sharers, one of whom the present plaintiff claims to represent, the patni talook which they held was put up for sale, and purchased by the defendant, Tarini Prasad Ghose. One of the

co-sharers, afterwards, brought a suit to have that sale set aside upon the ground of an informality in the proceedings before sale; and, upon that ground, the sale, eventually, was set aside.

Tarini Prasad, who was directed to pay his own costs, in defending that suit, in consequence of his having maintained that the sale had been regular, appealed against the judgment to this Court; and while that appeal was pending, he committed default in the payment of rent and the patni was again sold, and purchased by a third party.

Subsequent to that re-sale, the right, title, and interest of one Taramani, who was not a party on the record of the original suit for setting aside the first sale, but who is alleged to have had a certain interest in it, devolved, by her death upon a relation, named Beharilal. Against that Beharilal, the present plaintiff held a decree, and, in satisfaction of that decree, he caused those rights of Taramani which had so devolved to be put up for sale, and purchased them himself for rupees 6.

* Regular Appeal, No. 85 of 1869, from a decree of the Subordinate Judge of Nuddea, dated the 25th February 1869.

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which was decided by us on the 21st of February last, which arose out of another suit brought by Raghob Chandra Bandopadhyaya against the same Tarini Prasad Ghosh. There was a certain patni talook which was the property of Shasimakhhi Barmonya and others. That patni talook was put up for sale for arrears of rent, and purchased by the defendant Tarini Prasad. The ex-patnidars brought a suit in the Judge's Court, and succeeded in getting the sale reversed, on the ground of certain irregularities; but, in the meantime, Tarini Prasad, the purchaser, had himself committed default in the payment of rent,

It being impossible to execute the decree for setting aside the sale, by recovery of possession of the patni by reason of the second sale, this plaintiff first sued Tarini Prasad and certain other persons, to obtain a fractional part of the surplus proceeds of the second sale and he seems to have recovered a decree for that. He then sued Tarini Prasad for a similar share of the wasilat accruing for the time that Tarini Prasad had possession of the patni, and he recovered that: and now he brings a third suit (on the same cause of action, as it seems to me,) for compensation, valuing the patni at six lacs and ten thousand rupees, and adding thereto, the sum of 37,000 rupees which the zemindar had taken from the Collector's treasury as rent due to him out of the 98,000 rupees for which the patni sold, and adding these two sums together, he claims as his share 18,298 rupees, with interest, as being the balance of the proceeds of his original investment of 6 rupees.

This plaint, it is strange to say, resting entirely, as it does, upon the sale in execution of decree, was filed without the certificate of sale. The certificate of sale is not upon the record. It is not easy for us, therefore, to say, in the absence of that document, whether the plaintiff purchased anything at all, and what he did purchase. It is quite clear, however, that he made this purchase after all right to recover possession of the patni had passed away, and it was no doubt because that right had so passed away that he

made his purchase at so incredibly cheap a rate. That being so, it appears to me, that whatever the plaintiff was entitled to recover against these defendants, by reason of that purchase and under the decree already mentioned, constituted one single cause of action, and that he was bound to include in the suit, which he brought upon that cause of action everything to which he was so entitled.

The pleader for the plaintiff, respondent, before us, has shown a good deal of uncertainty as to whether he would deal with the subjects of the two suits, namely, wasilat and compensation, as two distinct things, or as the same things sought for on two different grounds; but whichever way it be, it seems quite immaterial, because it is quite clear that the plaintiff was bound to include in one suit the whole claim which accrued under that sale, whether made up of distinct things, or the same thing under two different names. The plaintiff having omitted, when he brought his first suit against the defendant in this cause of action, to sue for the compensation now claimed, cannot be allowed to maintain a separate suit just now. There would otherwise be no end to the proceedings against the defendant, arising out of this one right. I think this consideration is quite sufficient to exclude the plaintiff from recovering anything in the present suit, and it is therefore unnecessary to go into the other points. The judgment of the lower Court will be reversed, and the plaintiff's suit dismissed with costs.

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- and a re-sale had taken place, at which the the patni fetched the price of 98,000 rupees. Out of that sum, an amount of about 37,000 rupees was taken by the zemindar on account of rent due to him, and there remained in the Collectorate the balance of more than 60,000 rupees which stood to the credit of Tarini Prasad.

In this state of things, the right, title, and interest accruing to Shashimakhi Barmonya and others, in the patni previously mentioned, accruing by virtue of the decree by which the sale had been reversed, were put up for sale, and purchased by the plaintiff Khudumani. She, thereupon, obtained from the Civil Court a certificate declaring her to have become the purchaser of that right, title, and interest. This was on the 28th December 1864.

It should be mentioned that, previously to this purchase by the plaintiff, the right of Shashimakhi to wasilat of this patni had been sold privately to a certain Benimadhab.

The plaintiff, after acquiring these rights, in the first instance, brought a suit for wasilat, excluding the share of Shashimakhi, which had been already recovered by Benimadhab, and obtained a decree which was made the subject of appeal to this Court, and that case was ultimately compromised with the defendant, Tarini Prasad, for the sum of 8,500 rupees; and on the 12th February 1866, the plaintiff brought a separate suit against Tarini Prasad Ghose, which is headed "claim for 43,854 rupees 5 annas and 9 pie, on account of surplus sale proceeds." The plaint set forth the purchase by Tarini Prasad, the default by him, the re-sale, the fact of money standing in deposit in the Collector's office after payment of the zemindar's rent, the purchase by the plaintiff of the rights and interests of Shashimakhi and others, and it sought to establish the right of the plaintiff to recover the share which she had acquired by purchase of that sum in deposit which amounted to rupees 43,854-5-9.

It seems that in that suit, certain persons, co-sharers of Shashimakhi, presented petitions in which they contested the right of the plaintiff to recover anything by reason of her purchase, but those objections (it does not appear what investigation took place) were overruled, and the plaintiff got a decree for the

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greater part of the amount claimed against Tarini Prasad, but without costs, the alleged share purchased by the plaintiff turning out to be incorrectly stated, but costs were awarded against those parties who had intervened; and it seems that she drew out the money for which she had thus obtained a decree.

She now brings a third suit against the defendant, alleging that "though the above mentioned defendant was in possession of the patni mehal in question in 1268 (1861), had realized the rents from the darpatnidar, had secured decrees for rent against him, and subsequently reaped the fruits thereof, yet he fraudulently neglected to pay the rents of the zemindar. The said rents, together with interest and costs, have been satisfied from the sale proceeds, as also the Government fees have been deducted from the same. The amount, therefore, thus deducted from the sale proceeds, must be considered as a special loss entailed by the defendant on the real value of the aforesaid talook of Shashimakhi Barmonya, and her co-sharers; for the nature of the right, which, under the order setting aside the first sale, had accrued to the above-mentioned former patnidars for obtaining back possession of the mehal, was changed by the second auction sale consequent on the fraud of the defendant, and eventually resolved into a mere title to obtain the sale proceeds. Consequently, the above-mentioned former patnidars had also a title accrued to them for obtaining from the defendant compensation on account of the deduction which has been made from the above-mentioned sale proceeds, consequent on the fraudulent, unjust, and improper conduct adverted to of the defendant. Therefore, out of rupees 37,961-6-8, which have been deducted from the above mentioned sale proceeds, I have a right, derived in virtue of my auction-purchase, to obtain rupees 6,168-3-1, on account of Shashimakhi's 2 anna 13 ganda 1 cowrie and 1 krant share, as well as interest thereon, rupees 4,441-8, aggregating rupees 10,609-11-9," which accordingly, the plaintiff claims from the defendant.

It appears to me, as I have already remarked, during the argument in this case, that the case bristles, so to say, with difficulties for the plaintiff, who has to meet four or five most cogent reasons against her being entitled to recover anything under this

plaint; but the only question which we are really called upon to decide, is, whether the suit is not barred by section 7 of the Code of Civil Procedure.

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It appears to me that the suit is so barred. I am inclined to think that the claim to wasilat, as well as the claim to any portion of the sale proceeds, constitute parts of the whole claim which the plaintiff had arising out of the same cause of action. But whether that be so in respect of the wasilat or not, it seems to me abundantly clear, that the plaintiff's claim to the amount sought for in the present suit undoubtedly formed a portion of the sum claimed which comprised the amount recovered in the first suit for surplus proceeds of sale. This sum of rupees 37,000, of which the plaintiff now seeks to recover a part, was actually a portion of the entire sum of money paid in and originally standing in the defendant Tarini Prasad's name on account of the purchase-money of the patni talook. The plaintiff's first suit, as it were, admitted that the original proprietor of the patni could only be entitled to recover that portion of the proceeds of sale which remained over and above after payment of the zemindar's rent; and, accordingly, the plaintiff laid claim in that suit to a portion of that balance alone. There either was a just and righteous claim to the amount of rupees 37,000 or a portion of it, or there was not. If there was a just claim to that amount, it appears to me that the plaintiff was certainly bound to ask for it in the first suit, and that if she omitted to do so, then, she comes within the meaning of the 7th section of the Act, and having relinquished or omitted to sue for a portion of the claim accruing at that time, her suit for the portion so relinquished or omitted cannot be afterwards entertained.

The pleader for the respondent contended, with great ingenuity and force, that the causes of action were distinct. It was stated also that the parties were not the same; and moreover a mode of stating plaintiff's claim was resorted to which was never thought of in the Court of first instance.

The plaintiff's claim, now, was stated to be to recover a sum of money which had been improperly paid out of moneys belonging to the plaintiff to satisfy a debt of the defendant. This, it was

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stated, was the cause of action in the present suit, and was wholly distinct from the cause of action in the previous suit.

It appears to me that there is nothing in that contention. It did not, in the least, matter to the plaintiff where the money went or what became of it. Both the money claimed in the present suit and in the first suit, were portions of the amount claimable, whether justly, or not, by the plaintiff under the original purchase. It was stated that the first suit was not against Tarini Prasad, at least that the decree was not against him. It seems to me that this is wholly untenable. Not only in the plaint headed "for the recovery of, or claim for, rupees 43,000," and the suit is one brought against Tarini Prasad alone, but the decree is a decree for the larger portion of that money, and it is directed to be recovered by the plaintiff out of the sum standing in deposit in the Collector's treasury in the name of Tarini Prasad.

We have been much pressed with a case of *Subheer Khan v. Kalli Doss Dutt* (1). It is contended that that is a similar case to the present, where a Division Bench of this Court held that section 7, Act VIII of 1869, would not apply; but that, it appears to me, was an entirely different case from the present. The learned Judges who decided that case, say—"the plaintiffs and defendants were formerly co-sharers in a talook which was sold by the zemindar for arrears of rent. The surplus proceeds of the sale, after deduction of the rent of the year for which it was made, and of previous years' rent for the arrears of which the zemindar held decrees was divided among the co-proprietors. The plaintiff brought his share (two annas) of the talook in the year 1263 (1865) at a sale in execution of a decree." The learned Judges then go on to say "After the sale of the talook, the plaintiff applied to the Collector for payment of his share of the proceeds; but the sale to him being then unregistered, the Collector required him to establish his interest in the proceeds by a civil suit. Accordingly, the plaintiff sued the present defendants, and obtained a decree establishing his right to 2-16ths of the surplus proceeds; such surplus, in fact, then being the surplus remain-

(1) 1 W. R., 190.

“ing after the payment of all arrears due to the zemindar ;” and further on they say the only question in the case, is, “whether the plaintiff’s former suit does not debar him from “maintaining the present suit,” and again “whatever may be “the precise extent of the operation of the section, we think it “does not exclude the plaintiff from his present action. The “former suit was rendered necessary by the requisition of the “Collector who properly declined to recognize the plaintiff’s “right to any share in the fund then in the Collectorate, until “he had established his right thereto by suit.” That was a suit, therefore, against the co-sharers for the purpose of establishing the right of the plaintiff as between him and them. The judgment goes on to say—“besides his right to 2-16ths in that fund “as it then stood (reduced by payment of the zemindar of all “arrears), he had a personal claim against the old proprietors, “or some of them, in respect of the portion of the rents of the “year 1263 (1856) which had been taken from his share of the “property.” That was clearly and altogether a distinct subject-matter. It was a personal claim which the plaintiff had against his co-sharers, and which he was at liberty to have satisfied out of any fund, or any property of theirs which he could find. This, on the other hand, is a case in which there are two suits brought by the same plaintiff against the same defendant to enforce, as it seems to me, manifest portions of the same claim arising out of the same cause of action. I think, therefore, the defendant was clearly entitled to be protected from such vexatious proceedings, and that the suit ought to have been dismissed on that ground alone ; and therefore it is unnecessary to go into other points in the case or to call upon the pleader of the respondent to argue them. I think that upon the ground I have stated, the decision of the lower Court ought to be set aside, and the plaintiff’s suit dismissed, with costs.

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Before Mr. Justice L. S. Jackson and Mr. Justice Phear.

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March, 9.

GOPAL CHANDRA BISWAS (DECREE-HOLDER). v RAMJAN SIRDAR
AND ANOTHER (JUDGMENT-DECTORS).*

Act XI of 1865, s. 19—*Immoveable Property—Moveable Property—Growing Crops.*

Growing crops are "immoveable property," and execution of a decree of a Small Cause Court cannot be had against them under section 19 of Act XI of 1865.

THE following case was referred, for the opinion of the High Court, by the Judge of the Small Cause Court at Krishnaghur :—

"The decree-holder has applied for attachment of a standing crop of 3 bigas 15 katas of linseed, and 4 bigas 9 katas of *arhar*, belonging to his debtor. The question is whether growing crops can be held to be personal or moveable property, under section 19, Act XI of 1865, so that attachment can issue against them from this Court." The Judge referred to *Raj Chandra Bose v. Dharma Chandra Bose* (1), *Muhammad Sileman v. Satu Harji* (2), and to section 2, Act XX of 1866.

The opinion of the Court was delivered by

JACKSON, J.—In answer to the question put by the Small Cause Court at Kishnaghur, I think it clear that growing crops come within the category of immoveable property, and not within that of moveable property, and that the Small Cause Court should follow the decisions which the Judge has himself cited. In further support of the view taken in this decision, I may refer to the language of Act I of 1868, otherwise called the General Clauses Act of 1868, which declares in the 5th clause of section 2 that "immoveable property," in all the Acts made by the Governor-General in Council, after this Act came into operation, "shall include land, benefits to arise out of land, and "thing attached to the earth, or permanently fastened to any "things attached to the earth;" and in the 6th clause, it is stated that "moveable property shall mean property of every description, except immoveable property." This view is not affected by the fact that, for the purposes of the Registration Act, the Legislature has dealt with growing crops as though they constituted moveable property.

* Reference, No. 4 of 1870, from the Judge of the Small Cause Court of Kishnaghur, dated the 4th February 1870.

(1) 2 B. L. R., A. C., 77.

(2) 5 Bom. H. C. Rep., 90.

[ORIGINAL CIVIL.]

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Markby.

STEWART AND OTHERS (PLAINTIFFS) *v.* THE SCINDE, PUNJAB,
AND DELHI RAILWAY COMPANY (DEFENDANTS).

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March 11.

*Agent of Company, Authority of - Corporation - Seal - Contract - Companies
Clauses Consolidation Act, 8 & 9 Vict., c. 16, s. 97 - The Scinde Railway
Act, 1857, 20 & 21 Vict., c. 160.*

The Scinde Railway Company was incorporated by 18 & 19 Vict., c. 115, for the purpose of making and maintaining railways in India, and for other purposes. This was repealed by 20 & 21 Vict., c. 160 (1), which authorized the Company to extend their operations, and extend their capital, &c. This Act, by section 3, declared the Companies Clauses Consolidation Act, 1845(2) to be incorporated with it. By section 18, the Company have "a seal for use in India in lieu of the common seal of the Company, and from time to time may vary and renew it, and make regulations for its use; and except, as by this Act otherwise expressly provided, every document sealed with such seal, in conformity with such regulations, or in pursuance of any order of the directors, or of any authority given by the Company under their common seal, shall be as valid and effectual as if the common seal were affixed thereto." By section 54, "the Company, from time to time, may appoint and remove such committees, persons, or person, as the Company think fit to act on behalf of the Company in India or elsewhere, with respect to the making, maintaining, managing, working, and using of the railways and other works of the Company, and the control and conduct of any of the affairs in India or elsewhere of the Company; and may delegate to any such committee, persons, and person respectively all or any of the powers of the Company and of the directors and officers thereof which the Company thinks it expedient that such committee, persons, and person respectively should possess for the purposes of his or their respective appointment." In January 1867, E. was the Agent of the Company in India, and he entered, it was alleged, on their behalf into a contract with the plaintiffs, for 60 sets of iron-work for low-sided waggons. The plaintiffs' firm

(1) 20 & 21 Vict., c. 160.—"An Act for *Paragraph 2.*—"With respect to any authorizing the Scinde Railway Company contract which if made between private to extend their operations, and for regulating the capital of the Company, and for other purposes. [25th August 1857.]"

(2) 8 & 9 Vict., c. 16, section 97.—"The power which may be granted to any contract on behalf of the Company in such committee to make contracts' as well writing signed by the committee or any as the power of the Directors to make two of them, or any two of the directors, contracts on behalf of the Company may and in the same manner may vary or lawfully be exercised as follows:— discharge the same."

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did not deal in iron-work, and they had to get the goods manufactured for them in England. The Board of Directors were at the time supplying iron-work for the Company. There was nothing to show that E. had been appointed under the provisions of section 54 of the Act, 20 & 21 Vict., c. 160, nor was there any evidence of the extent of his power or authority. A specification of the contract differed from it, in that it stated the waggons to be covered waggons, and not low-sided waggons. The contract was not made under seal of the Company, nor was the iron-work, the subject of the contract, ever accepted by the Company. The defendants admitted that at the date of the alleged contract, E. was the Agent of the Company in India, but denied that his power extended to the making of such contract; they further stated that the contract if entered into had been afterwards cancelled.

Held, by PHEAR, J., that there was no evidence to shew that E. had authority to make the contract. The contract was one which E. would have had power to make in writing only, under section 97 of 'the Companies' Clauses Consolidation Act, had he been appointed under section 54, 20 and 21 Vict., c. 160, but there was no proof of such appointment.

Held, on appeal, that, assuming that E. had been appointed under section 54 with powers as large as in the ordinary course could be conferred upon him under that section, the contract was not one by which, acting as such agent, he had power to bind the Company.

THIS was an appeal from a decision of Mr. Justice Phear. The suit was brought to recover rupees 84,000, being the contract price of 60 sets of iron-work for low-sided waggons, which they had supplied in accordance with the terms of a contract entered into between the plaintiffs and Colonel N. Elphinstone, the Agent of the defendant Company, but which the said Company refused to accept. The plaintiffs described themselves as the members of the firm of J. Walter Brothers, carrying on business in Calcutta; the defendant Company was described as carrying on business in London, and also at Lahore, Punjab.

The plaint stated that the contract was embodied in an order signed by Colonel Elphinstone, and was made in Calcutta, on the 10th January 1867, for 60 sets of iron-work for low-sided waggons, as the price of rupees 1,400 per set, exclusive of carriage from Calcutta; such iron-work to be delivered at the store godowns of the Company at Lahore within a reasonable time; and the plaintiffs alleged that they were ready and willing to deliver the iron-work as by contract. In their written statement, the plaintiffs alleged that they executed the order for the iron-work in England.

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The defendants stated in their written statement, that the order, if made, had been cancelled. They further stated that the plaintiffs had not complied with the terms of the contract by delivering the iron-work at Lahore. The defendants did not admit that Colonel Elphinstone, though he was their agent, had power to bind them.

The Scinde Railway Company was incorporated in 1855 by Act of Parliament, but that Act was repealed, and the Company was modified, and its scope of operations enlarged by an Act of 1857 (1), called the "Scinde Railway Act," the material parts of which are as follows :—

After reciting the Act of 1855, it was enacted by—

"Section III. 'The Companies' Clauses Consolidation Act, 1845,' is incorporated with this Act, and applies to the Company in India and elsewhere, as well as in England, and shall be construed and have effect accordingly.

"Section XVIII. The Company may have a seal for use in India in lieu of the common seal of the Company, and from time to time may vary and renew it, and make regulations for its use; and, except as is by this Act otherwise expressly provided, every document sealed with such seal, in conformity with such regulations, or in pursuance of any order of the Directors or of any authority given by the Company under their common seal, shall be as valid and effectual as if the common seal were affixed thereto.

"Section XIX. The Company, from time to time, may negotiate for, conclude, enter into with the East India Company, and carry into effect contracts and agreements with respect to all or any of the following matters; (to wit),

"1. The making, maintaining, regulating, working, and using by the Company of the Scinde Railway and of the Punjab Railway as now proposed respectively, or any other Railway or Railways in India, either wholly or partly in lieu thereof respectively or otherwise, and any extensions of and branches from the same respectively, and any works and conveniences connected therewith respectively comprehending all the works mentioned in section sixth of this Act:

"2. The building, providing, hiring, and employing by the Company of steam boats and other vessels, and the construction of all necessary works, quays, and wharves, for the purposes of the undertaking:

"3. The acquiring by the Company of lands in India for the purposes of their undertakings:

"4. The obtaining by the Company from the East India Company of any guarantee of interest on the capital of the Company and any other support, countenance, and facilities for the purposes of their undertakings:

(1) *Ante*, p. 195.

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- " 5. The securing to the East India Company of any facilities, rights, and advantages with respect to the railways and steam boats or other vessels :
- " 6. The making of provision with respect to the classification of shares in the capital of the Company, and the rate of dividend thereon respectively, and the conversion of debt into capital, and the amounts and times of calls on shares and the transfer of shares, including restrictions on the transfer of shares not fully paid up, and the tolls, charges, revenue, and profits of the Company, and the deposit, custody, and application thereof respectively :
- " 7. The giving to the East India Company, and to any of their officers, agents, or servants, of any absolute, or other rights of supervising, controlling, and regulating the Company, and the works, contracts, accounts bye-laws, proceedings, acts, and affairs of the Company in England, in India, and elsewhere respectively :
- " 8. The enabling of the East India Company to appoint an *ex-officio* Director of the Company (whether qualified by holding shares or not) in the place of any ordinary Director of the Company or otherwise :
- " 9. The regulating of the powers (including even a right of veto) at the Board of Directors, and the duties, proceedings, and liabilities of any such *ex-officio* Director :
- " 10. The binding of the Company to conform to and fulfil any directions given by the East India Company or by their officers or agents in that behalf authorized, touching all or any of those matters respectively :
- " 11. The appointing of agents of the Company in India or elsewhere, and the determining and regulating of their powers, duties, and remuneration :
- " 12. The depositing with or paying to the East India Company of all or any part of the subscribed capital or other money of the Company upon any terms as to interest or otherwise agreed on :
- " 13. The making of provision with respect to any lands granted or leased to the Company by the East India Company or otherwise :
- " 14. The charging of all or any part of the property of the Company with any sum of money on any terms agreed on :
- " 15. The surrendering or selling at any future period to the East India Company, or to any other persons, of the Railways or any part thereof, or of all or any part of the property of the Company, and the winding-up of the affairs of the Company and the distribution of the net assets of the Company among the shareholders :
- " 16. The referring of differences to arbitration :
- " 17. The making of provision for enforcing or securing the due performance of any contract or arrangement made by the Company :
- " 18. The uniting of all or any part of any Railways or Railway, or of any undertaking of the Company, or both, with any other Railway or undertaking :
- " 19. Generally, all such provisions and stipulations with respect to the matters provided for by this Act, or any of them, and the purposes of the Company and the encouragement and promotion thereof, and the eventual or

contingent transfer of the same or any part thereof to the East India Company or to any other persons, as the East India Company and the Company think fit, and mutually agree on.

"Section XLII. The Ordinary Meetings of the Company shall be held half-yearly in or within thirty days of the months of February and August, or at such fixed time as the Company by the Resolution of an Extraordinary Meeting from time to time appoint, and all the General Meetings of the Company shall be held in England.

"Section LIV. The Company, from time to time may appoint and remove such committees, persons, or person as the Company think fit to act on behalf of the Company, in India, or elsewhere, with respect to the making, maintaining, managing, working, and using of the Railways and other works of the Company, and the building, providing, or hiring, and maintaining and using of the steam boats or other vessels of the Company, and the disposal of, issue, registration, and transfer of shares and of bonds, and the registration of shareholders, and the control and conduct of any of the affairs, in India or elsewhere, of the Company, and may delegate to any such committee, persons, and person respectively all or any of the powers of the Company and of the Directors and officers thereof, which the Company think it expedient that such committee persons, and person respectively should possess for the purposes of their or his respective appointment.

"Section LV. The Company may, from time to time, determine the quorum of any such committee or persons, and may determine and regulate the authority, duties, procedure, liabilities, and remuneration of any such committee, persons, and person respectively, and generally may make such provisions and regulations for their and his respective Government and conduct as the Company think expedient.

"Section LVI. All the proceedings and acts of such committees, persons, and person respectively within their and his respective authority shall (but subject to any regulations of the Company requiring such proceedings and acts or any of them to be confirmed by the Directors) be as valid and effectual as if they were proceedings and acts of the Directors.

"Section LVII. The committees, persons, and person respectively so from time to time, appointed shall, with respect to all their and his respective lawful proceedings and acts within the limits of the authority conferred on them and him respectively, have the like discretions and indemnities as if they and he respectively were or was Directors or a Director of the Company."

PHEAR, J.—The defendant Company is sued for breach of a written contract, which is alleged to have been made with the plaintiffs, by one Colonel Elphinstone, as agent, on behalf of the Company, and the plaintiffs seek compensation in damages for the loss which they have sustained by such breach.

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I have already expressed my opinion that the making of the contract by Colonel Elphinstone is proved, and that there never was any effectual rescission of it.

Next comes the question, whether or not the defendant Company is bound by the act of Colonel Elphinstone in this matter.

The defendant Company in effect denies that it is so bound, although it admits that Colonel Elphinstone was, at the time of the alleged making of the contract, the agent of the Company. For the plaintiff it is urged that this admission is sufficient to make out a *prima facie* case in support of the plaint, and to throw upon the defendant Company the *onus* of showing that Colonel Elphinstone's agency powers were limited, and did not extend to the making of a contract such as that sued upon.

I own that I have from the beginning felt much difficulty with regard to this question; but after consideration I am of opinion that the fact of Colonel Elphinstone being the Company's agent as admitted in the defendant's written statement, does not, of itself, support the inference that he could bind it in the matter of the contract which is sued upon. The Company is incorporated by Act of Parliament, and all its meetings must be held in England. The Agent is one of its principal officers in this country, and I understand the defendant's written statement merely to admit that Colonel Elphinstone was such officer, not that he was agent in the sense of being a person duly authorized to act for the Company.

If this be so, the question before me is narrowed to this, *viz.* : Is it shown by any other evidence than that which is afforded by the defendant's written statement, that Colonel Elphinstone, the officer denominated Agent of the Company, had authority to make the contract on behalf of the Company? The plaint itself states, that the Company was incorporated by the Act of Parliament entitled "The Scinde Railway Act, 1857." In fact, however, it was incorporated by Act of Parliament entitled "The Scinde Railway Act, 1855," but the provisions of this Act were entirely re-cast, and its scope of action very materially extended by the Act of 1857; and this latter Act is now the Act which solely governs the Company in all respects, for the 5th section provides "that, on the passing of this Act, but subject to the provisions

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thereof, the recited deed of settlement is by this Act annulled, and the recited Act of 1855 is by this Act repealed." The first important section of the Act of 1857, as material to this case, is the 3rd, which declares that the Companies' Clauses Consolidation Act, 1845, is incorporated with this Act, and applies to the Company in India and elsewhere, as well as in England. By the Act of incorporation the Company has a special seal, but further by the 18th section of the Act of 1857 it has also a seal for use in India in lieu of the common seal of the Company, and from time to time may vary and renew it, and make regulations for its use; and that section goes on to say, that, "except as is by this Act otherwise expressly provided, every document sealed with such seal, in conformity with such regulations, or in pursuance of any order of the Directors, or of any authority given by the company, under their common seal, shall be as valid and effectual as if the common seal were affixed thereto." It seems to me, then perfectly clear, that the defendant is a corporate body provided with a common and a special seal, and so situated, that it can generally contract only under seal, or by the particular mode which is statutably provided by the Companies Clauses Consolidation Act, to which I shall presently refer.

I say generally, because there is of course a class of cases which are in some degree exceptional, and in which the Company as a corporation can bind itself otherwise than under seal, or in accordance with the statutable provisions of the Companies' Clauses Act. I refer to that particular class of cases, in which the common law of England will hold a corporation to be bound by a contract, notwithstanding that it is not made under seal; but these are cases, where the matter of the contract belongs to the ordinary every-day business of the corporation, and is of such a character that it would be the cause of vexatious harassment to insist upon the contract being made with all the formalities which necessarily attach to the affixing of the seal of the corporation. Now I am unhesitatingly of opinion, that the contract which is sued upon does not fall under this head. No doubt, the subject of the contract, viz., 60 sets of iron work, for low-sided waggons, is one of those things which are necessary for the proper working of the business of the Company; but it cannot be said that an order for 60 sets of per-

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manent iron-work of this sort, costing on the whole upwards of Rs. 80,000, is of such a kind as that it should naturally be within the province of one of the servants of the Company to make it in the daily carrying on of the work of the company. On the face of this contract, one would, I think, be led to say that the matter of it was such as ought to receive the deliberate consideration of the directors of the Company, or of other persons expressly authorized to act as Directors, in the management of the affairs of the Company, if such there are. But further than this, I observe that the contract is one which, in this particular case, was not only not intended to be executed in India, but which could not reasonably be expected to be executed in India. It was not such a contract as a local Agent must have implied authority to make, if the daily working of the Company is not to be stopped. Indeed the plaintiff himself, after having made the contract, was no better able to execute it than Colonel Elphinstone. He was not a maker of this kind of iron-work, nor even an agent residing here for the purpose of accepting contracts, on behalf of a manufacturer in England. Before he could carry the contract into effect he had to go to England, and himself find out a manufacturer. I think I should be going far beyond any of the decisions which have yet been made in the Courts of Westminster on this point, if I held that this contract was such a contract as the Common Law of England would hold to be valid as against this Company, notwithstanding it was not made under seal. There is another class of cases which are seemingly, at first sight, an exception to the rule which requires the contract to be made under seal. These are cases where the action is brought for goods delivered and accepted, or for money due upon a contract which is to be implied from the fact that the corporation has received benefit from the plaintiffs for which it is in equity bound to pay. The contract in these cases, however, is really one of those which falls under the last provisions of the 97th section (1) of the Companies' Clauses Act. The distinction between

(1) 8 & 9 Vict., c. 16. s. 97, *paragraph* committee or the directors may make
3.—“With respect to any contract which such contract on behalf of the Company
if made between private persons would be by parol only without writing, and may
law be valid, although made by parol vary and discharge the same.”
only, and not reduced into writing, such

the present case and a case of that kind is illustrated by the decisions of the Court of Exchequer in two cases. The first is the case of *Finlay v. The Bristol and Exeter Railway Company* (1) in which it was held that the Bristol and Exeter Railway Company were liable to pay for the use and occupation of premises which they had actually used and occupied, with the permission of the landlord for the time of such occupation ; but that they were not liable to pay rent for any further portion of the time, as for a term of tenancy, because the contract of tenancy relied upon was parol and not under seal. In that case, section 97 of the Companies' Clauses Act applied as well as here. In *Pauling v. The London and North-Western Railway Company* (2), the defendant company was sued for the purchase of some 6,000 sleepers purchased for the plaintiffs, under an order given by the Company's engineer. The Company had accepted the sleepers, and had used them, and upon that ground, the Court held they were liable to pay for them. Baron Alderson, one of the Judges who decided the case, expressly stating that he so held because he was of opinion that the provisions of the Companies' Clauses Consolidation Act applied and made the implied contract arising from the acceptance and use of the sleepers a good contract against the Company. Now here the iron-work, the subject of the contract, has never been accepted by the Company. It is even doubtful whether there has been anything sufficient to amount to a tender of it ; probably it is not very important to consider whether there was actually a tender or not, because there can be no question but that the Company have very emphatically declared that they will not accept it. There being, therefore, nothing in this case to raise an implied contract on behalf of the Company to pay for these goods, and the contract being, in my opinion, one which the Common Law of England does not authorize to be made by this corporation, otherwise than under its seal, the contract cannot, in my judgment, be valid unless it has been made in accordance with the express provisions of section 97 of the Companies' Clauses Consolidation Act, which the Act of 1857 makes applicable to this case, and which I have already several

(1) 7 Exch., 409.

(2) 8 Exch., 867.

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times referred to. The provisions of this section are divided into three paragraphs, the first of which refers to contracts made under seal. The second says: "With respect to any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith, then such Committee or the Directors may make such contract on behalf of the Company in writing signed by such Committee or any two of them, or any two of the Directors, and in the same manner may vary or discharge the same." Now the defendant being an English Company is entitled here to claim the benefit of English law, and I think that this contract is one which the English law would require to be in writing, and signed by the party to be charged therewith. Is the contract then signed by a committee of Directors within the meaning of this clause, or any two of them, or any two of the Directors of the Company? Clearly it is not by the committee of Directors which is authorized by section 95 of the same Act, to act on behalf of the Company, in the place of the whole body of Directors. But here may come into operation section 54 of the Scinde Railway Act of 1857, which says that "the Company, from time to time, may appoint and remove such committees, persons, or person, as the Company think fit to act on behalf of the Company in India, or elsewhere, with respect to the making, maintaining, managing, working, and using of the Railways and other works of the Company, and the building, providing, or hiring, and maintaining and using of the steam boats or other vessels of the Company, and the disposal of, issue, registration, and transfer of shares, and of bonds, and the registration of shareholders, and the control and conduct of any of the affairs in India, or elsewhere, of the Company, and may delegate to any such committee, persons, and person respectively all or any of the powers of the Company, and of the Directors and officers thereof, which the Company think it expedient that such committee, persons, and person respectively should possess for the purposes of their or his respective appointment." If that section had been acted upon, and if Colonel Elphinstone had been appointed by the Company to be a person delegated with the power of the Company, or of the Directors thereof,

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then no doubt his signature to this contract would be a signature of two Directors within the meaning of the 97th section of the Companies' Clauses Consolidation Act, which I have just read. But whether Colonel Elphinstone has been so appointed by the Company or not, I have no materials before me to lead me to determine, and I think that I must hold the plaintiff responsible for this failure of proof. He was bound, in order to maintain this suit against the Company, to show that the person who contracted on behalf of the Company was capable of binding it. I have already said that, in my opinion, this so called admission of the defendants in their written statement does not amount to *prima facie* evidence of Colonel Elphinstone's power to act for the Company in this matter; and the plaintiff must be taken to know that, according to the terms of the Act of Incorporation, Colonel Elphinstone could not have that power except by express delegation from the Company, which of course must be made under seal, or expressly conferred by the Directors, and no such delegation by the Company has been adduced in evidence. My conclusion is, that the plaintiffs have failed in their suit, and that it must, therefore, be dismissed. But I think on the whole that each party should pay their own costs on scale No. 2.

From this decision the plaintiffs appealed on the following grounds:

1. That, having regard to the written statement of the defendants, it was sufficiently proved in fact that Colonel Elphinstone, the agent of the defendants in this country, had authority on their behalf to enter into the contract, the subject of this suit.

2. That, on the evidence of the plaintiff, Randolph Stewart, taken on commission on behalf of the defendants, it rested on the defendants to contradict that evidence as to the authority of Colonel Elphinstone by the examination of the Chairman, Directors, or other officials of the defendant company in England, if they could have done so.

3. That the question of the authority of Colonel Elphinstone to make the contract was not fairly or substantially raised as a ground of defence in the written statement of the defendants, or in the correspondence.

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4. That the plaintiffs ought to have been decreed entitled to the sum claimed with costs.

Mr. *Graham* (with him Mr. *Branson*) for the appellants.—Where the subject-matter of the contract is necessary for the carrying on of the works, in respect of which, and for the purpose of carrying on which, the Company was formed, the Company may sue for breach of it, though the contract was not under seal: *The South of Ireland Colliery Company v. Waddle* (1). This overrules the cases of *The East London Waterworks Company v. Bailey* (2), and *The London Dock Company v. Sinnott* (3), which were formerly considered authorities. By section 3 of the Scinde Railway Act, 1857, the Companies' Clauses Consolidation Act, 8 & 9 Vict. c. 16, is incorporated with that Act; and by section 54 of the Act of 1857, the Company can delegate their powers to their Agent in India. The powers, therefore, given by the 2nd paragraph of the 97th section of the Company's Clauses Consolidation Act could be given to such agent. Such agent would then be enabled with respect to "any contract which if made between private persons would be required to be in writing" to make a valid contract by making it in writing signed by him under his own hand. If there is no sufficient proof of the appointment of Colonel Elphinstone, it is the fault of the defendants. They do not negative the *prima facie* case that he had authority to bind them; he must, therefore, be taken to have had authority—*Totterdell v. The Fareham Blue Brick and Tile Company* (4), *Royal British Bank v. Turquand* (5).

Mr. *Branson* on the same side.—It was on the defendants to show that Colonel Elphinstone exceeded his authority. An order was given by him which the defendants say was cancelled; thus they put their defence on the ground of the order having been cancelled; not on the want of authority on the part of Colonel Elphinstone.

Mr. *Marindin* and Mr. *Evans* for the respondents were not called on.

- (1) 37 L. J. C. P., 211; S. C. on appeal
38 L. J., C. P., 338.
(2) 4 Bing., 283.

- (3) 8 E. & B., 347
(4) 1 L. R. C. P., 674
(5) 6 E. & B., 327.

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• The judgment was delivered by

NORMAN, J. (who after reciting the heading of the plaint and the 3rd, 18th, 19th, 54th, 55th, and 57th sections of the Scinde Railway Act of 1857, proceeded):—Now it appears to me to be admitted, by the form which these proceedings have taken, indeed by the questions put to Mr. Stewart, that Colonel Elphinstone was the Agent of the Company; and I think that, for the purposes of this case, I must assume that he was such an agent as could have been appointed by the Company under the 54th section of the Act of 1857. The case is remarkably bare of any evidence to show what was the authority actually possessed by Colonel Elphinstone. The plaintiffs had full notice by the written statement of the defendants that the authority of Colonel Elphinstone to enter into this contract was not admitted. In the 4th paragraph of the defendants' written statement this passage occurs: "Even if the alleged order be genuine, and assuming that Colonel Elphinstone had the power to bind the defendants, which is not admitted," that is to say, to the proof of which we put the plaintiffs. The defendants, therefore, distinctly gave notice by their written statement that they did not admit the authority of Colonel Elphinstone to make the contract now in dispute. If any doubt remained on the minds of the plaintiffs, whether the defendants intended at that time to deny Colonel Elphinstone's authority, it is plain that that doubt must have been removed, at or before the time when the plaintiff, Randolph Stewart, was examined in London. In answer to questions put to him by his own counsel, he says "Colonel Elphinstone signs as agent of the Company. He was the agent in India. There is no superior officer to him in India. I know the general idea there is, that he represents the Board. Mr. Andrew (who was Chairman of the Board of Directors of the Company) and I have had a conversation since, and he told me Colonel Elphinstone had no right to order these things."

Now, in the ordinary course of the conduct of a case, if a person is suing a principal upon an order given by an agent, he is bound to show that the agent had authority from the

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principal to give such order ; but no evidence was given by the plaintiffs in this case as to the extent of Colonel Elphinstone's authority. On the other hand, it may be said that no evidence was given by the defendants showing what were the limits of Colonel Elphinstone's authority. No power of attorney to him from the Company ; no instructions such as are contemplated by the Scinde Railway Company's Act have been given in evidence on the part of the defendants. I may, therefore, assume, that he was the agent of the Railway Company in India, an agent with powers as large as, in the ordinary course could be conferred on him, under the 54th section of the Scinde Railway Company's Act of 1857.

The plaintiffs allege that the defendants through their agent, Colonel Elphinstone, contracted with the plaintiffs' firm in Calcutta for the supply by the plaintiffs of 60 sets of iron-work for low-sided railway waggons, the terms and conditions of which said contract are embodied in an order given by the said defendant Company, through their said agent, to the plaintiffs, in writing dated on or about the 10th January 1867, and which said order is in the words and figures following :

" PUNJAB AND DELHI RAILWAY COMPANY.

GENERAL STORE DEPARTMENT.

Store Order No. 3.

CALCUTTA, January 10. 1866.

TO MESSRS. WALTER BROTHERS.

" I have to request you to deliver, on account of this Company, at their Store Godown, Lahore, within—days, the following articles : "(*There is then a description*) " 60 sets of iron-works for low-sided waggons," (*and the rate is entered as*) " Rs. 1,400 a set, exclusive of carriage from Calcutta." (*It is stated that the waggons are required as*) " Rolling stock, Punjab Railway." (*Then follow the words,*) " this order to be attached to the bill when submitted for payment."

(Sd.) N. ELPHINSTONE, Agent."

Now if that document stood alone, we cannot but observe that it is certainly a most remarkable document. It would have been extraordinary that such an order should have been given by the agent of any Railway Company to any merchant. There

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is no description of the breadth of the gauge of the line on which the waggons are to be employed ; no specification as to the length or height of the sides of the waggon ; no specification of the weight which they were intended to be fitted to carry ; no stipulation as to the quality of the iron-work, or as to the time at which the waggons were to be delivered ; no security is taken from the plaintiffs for the performance of the contract. There are none of those stipulations, which, according to the ordinary course of mercantile usages, one would expect to find in an order of this description, for the protection of the Scinde Railway Company. If this document stood alone, Mr. Stewart would not have known, I suppose, what sort of low-sided waggons were to be supplied.

But there comes another matter. In the 5th interrogatory which was put to Mr. Stewart, he was asked " when, or about " the time when the order was given, did you or your firm receive, and from whom, any other, and what paper, relating to the " subject of the order ? If you did, produce the paper, or state " what has become of it" ? To this his reply was " I received a " specification which I produce, and which is now marked as " exhibit No. 2." The specification is as follows :

"Specification of Iron-work required for a Covered Goods Waggon for a Railway of 5-6 gauge.

Dimensions of Waggon—

16 ft. 8 in. long, out side body.

8 ft. 4 in. broad, out side body.

11 ft. 6 in. extreme height from rail."

Then there is a detailed specification of the iron-work for wheels, springs, scrolls, links, buffers, horse-plates, axle-boxes, break-work, roofing hinges, strong iron knees, iron roof sticks, and of the weight which the iron-work complete for each carriage was not to exceed.

If that specification had been a specification with reference to which the contract was made, the same description of goods, covered waggons and not low-sided waggons, would have been mentioned in the order. But either that specification relates to the order or not. If it relates to the order, it is clear that the

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action must fail on a ground which has not been argued before us, because the order is inconsistent with the specification, and it is, therefore, impossible to say what the contract really was. It is perfectly uncertain: the order is for low-sided waggons, and the plaintiffs have brought this suit upon a supposed contract for delivery by them of low-sided waggons. But the specification mentions covered waggons, and that Mr. Stewart understood it to be an order for covered waggons is plain from the evidence of the Engineer. Mr. Shanks was called as a witness by the plaintiffs. He says, "I am a Civil Engineer. I have been employed on railways; I went with an order to inspect iron for low-sided waggons at the Bonded Warehouse, about a month ago; there were sufficient wheels for 60 sets, there seemed to be iron for 60 sets of waggons. I examined them with the specification. I had a copy of the specification with me. When I examined the goods, they corresponded, except the goods specified in 2 pairs. These goods form no part of low-sided waggons. The specification is for goods (covered) waggons. They are different as to ends, sides, and roofs; all the parts of low-sided waggons were there. There appeared to be 60 sets; they do correspond with the specification."

So that what the plaintiffs supplied, or were ready to supply, was not low-sided waggons, which they now say is the contract, but covered waggons in accordance with the specification. If this point, which appears on the face of the case, had been taken, my own impression is strong that we should have been bound to say that there is no contract whatever. It is utterly uncertain what Colonel Elphinstone contracted for, and the plaintiffs themselves do not appear to have known what the contract was till they went to their lawyers.

If, however, the contract was for low-sided waggons, and the specification is no part of the contract, I should be strongly disposed to hold that the contract, on the very face of it, is not one made in the ordinary course of business; and, therefore, not one which Colonel Elphinstone, as agent of the Railway Company, had authority to enter into, or by which the plaintiffs could have supposed that Colonel Elphinstone had a right to bind the defendants. This point, however, has not been argued before us, and I therefore pass from it.

I will now say a word as to the form of the contract. One of the grounds on which the decision of Mr. Justice Phear went, was that this was a contract, by which the Company were not bound, because it was not a contract under seal. Mr. Graham contended that the 97th section of the Companies' Clauses Consolidation Act of 1845 is embodied in the Scinde Railway Company's Act of 1857; and that by the 54th section of the last mentioned Act, it is provided that the Company may delegate to their agent in India, all or any of the powers of the Company and of the Directors and officers thereof. He argued that the power of the Directors to make contracts in writing not under seal as specified by the second clause of the 97th section of the Companies' Clauses Consolidation Act, 1845, might be delegated to the agent in India; and therefore that, with respect to any contract which, if made between private persons, would be required by law to be in writing and signed by the parties to be charged therewith, the powers to make such contracts might lawfully be exercised by the agent in India, by making a contract in writing signed by him under his own hand.

By the Scinde, Punjab, and Delhi Railway Act, as already pointed out, the Company are empowered to delegate to any person appointed under section 54 all or any of the powers of the Company and of the Directors and officers thereof. Now the contract under consideration is one which, if made between private persons, is required by the Statute of Frauds to be in writing, signed by the parties to be charged therewith. Under the 8 & 9 Vict., c. 17, sec. 97, it might clearly have been made in writing signed by a committee of Directors or any two of them. I think if Colonel Elphinstone was duly empowered under section 54, and I shall assume that he was so, the contract might have been valid, if duly signed by Colonel Elphinstone as agent. I am, therefore, not prepared to say that the suit should be dismissed on the ground that the contract was not under the seal of the Company, or any seal in use in India, as provided by the 18th section of the Scinde Railway Company's Act of 1857. On the contrary, so far as the want of seal is concerned, I think that, in point of form, the contract is good.

The real question in this case—and it is a very import-

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ant one—is whether the contract is one by which Colonel Elphinstone, as agent appointed to act on behalf of the Company in India would have power to bind the Company assuming that he had the greatest powers contemplated under the 54th section of the Scinde Railway Act of 1857.

In Story on Agency, section 21, it is pointed out that “general agents are to be carefully distinguished from universal agents; that is, from agents who may be appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an universal agency may potentially exist, but it must be of the very rarest occurrence. And indeed, it is difficult to conceive of the existence of such an agency practically, inasmuch as it would be to make such an agent the complete master, not merely *dux facti* but *dominus rerum* the complete disposer of all the rights and property of the principal. It is very certain that the law will not, from any general expressions however broad, infer the existence of any such unusual agency : but it will rather construe them as restrained to the principal business of the party in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, for example, if a merchant about to go abroad for any purposes should delegate to an agent his full and entire authority to sell any of his personal property, or to buy any property for him or on his account, or to make any contracts, and also to do any other acts whatsoever, which he could, if personally present ; this general language would be construed to apply only to buying or selling connected with his ordinary business as a merchant ; and would not, at least without some more specific designation, be construed to apply to a sale of his household furniture, or his library, or the common utensils, provisions, and other necessities used in his family. Much less would it be construed to authorize any contracts to be made, which would be of an extraordinary character.” In the 62nd section of the same work, it is said “language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and, therefore, it is to be construed and limited accordingly.”

An instance is given in the 67th section: "A power of attorney by a principal to another person for him, and on his behalf to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require; and generally to do, negotiate, and transact the affairs and business of him (the principal) during his absence, as fully and effectually as if he were present and acting therein, has been held not to authorize the agent to accept bills drawn on him upon account of a partnership, in which the principal was a partner, but only to accept bills drawn on him upon his individual account. The language of the instrument conferred an authority to accept bills for the principal, and on his behalf. No such power requisite as to partnership transactions; for the other partners might bind the firm by their acceptance, and therefore the words of the instrument might well be confined to their obvious meaning, namely an authority to accept in those cases where it was right for the principal to accept in his individual capacity."

The 68th section goes on "indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect;" and in section 70 it is said that "principles very similar may be traced back to the Roman law; for, in that law, where the authority was express or special, the agent was bound to act within it; and where it was of a more general nature, still the agent could not bind the principal beyond the manifest scope of the objects to be accomplished by it."

To apply those principles to the present case. Under section 54, the agent is to be an agent to act on behalf of the Company in India and elsewhere. Colonel Elphinstone is the agent of the Company in India. Can it be said that a power to enter into a contract for the supply of railway waggons to the value of Rs. 84,000, to be manufactured in England, was necessary for the purpose of enabling Colonel Elphinstone to act on behalf of the Company in India? Can it be supposed to be within the scope of the agency of a person whose principal is a Company having a Board of Directors?

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Now I must state that this contract is not even shewn to be a contract with a firm which was in the habit of dealing in iron-work. Mr. Stewart admits that this was the first contract he had in iron-work. He says, that Colonel Elphinstone knew that he could not execute the contract for the iron-work in Calcutta and that it was necessary for him to do it in England. He says "Colonel Elphinstone told me he was very hard pressed to get iron-work ; that the Board could not supply it fast enough and I think he asked me if I could get some, because he said they had notice from the contractors that the Delhi line would be open directly, and they had not sufficient rolling-stock for it; that he was afraid the Government would censure them for the matter, and perhaps take over the line from the Company." He says, "I told him I thought I was in a very good position to get it as expeditiously as possible, because the cousin of my father, who was a great personal friend of my father, as well as his cousin, was head of the great firm of Sharp, Stewart, and Co., the locomotive builders. Nothing more passed that I remember; he then gave me the order about that time. I left soon after. He was in Calcutta at the time of giving the order."

Therefore it appears that, at the time that the order was given, the Board of Directors in England were supplying iron-work for the purposes of the Railway. The plaintiff had distinct notice that Colonel Elphinstone was not contracting here for the iron-work, but that the Board was supplying it. He knew, therefore, that Colonel Elphinstone had not been acting as the agent of the Company, for the purpose of getting supplies of iron-work. Colonel Elphinstone knew also that the railway-waggon work mentioned in the contract was to be supplied, not from any stock in India, but that the contract was to be executed in England; and that it would have been easy for him to have written to his principal in England who might have entered into a contract for the supply of the iron-work with a firm or firms in England. It cannot, in my opinion, be said, that it was in any way necessary for the purpose of the authority given to Colonel Elphinstone as agent in India that he should have power to enter into a contract for iron work of great value to be manufactured in London. There is no reason for opining that the Directors either expressly or impliedly

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delegated to their agent in India a power to enter into a contract, which they could have made themselves without his intervention, and with advantages which he in India would not possess the execution of which they might have superintended, and the performance of which they themselves might have watched and enforced.

Bearing in mind always that it is necessary for one who seeks to charge a principal upon a contract by an agent to show that the agent had authority to bind the principal by such contract, it appears to me that the plaintiffs have not made out a *prima facie* case of authority on the part of Colonel Elphinstone to enter into the contract for the supply of this large quantity of waggons to be manufactured in England; and for this reason it appears to me that the plaintiff's case has wholly failed. They have wholly failed to sustain the burden of proof that is thrown upon them for showing that the Scinde, Punjab, and Delhi Railway are bound by the contract of Colonel Elphinstone in this matter.

On that ground, I think that the decision of Mr. Justice Phear dismissing the suit is correct, and the appeal, therefore, in my opinion, ought to be dismissed with costs to be taxed on scale No. 2.

Attorneys for the appellants : Messrs. *Robertson & Co.*

Attorneys for the respondents : Messrs. *Berners & Co.*

[APPELLATE CIVIL].

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

KILARAM MAJI (PLAINTIFF) v. NARAYAN DAS (DEPENDANT).*

Prisoner's Testimony Act (XV of 1869)—Defendant in Custody—Act VIII of 1859 s. 78.

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A Judge of a Small Cause Court in the Mofussil can direct the jailor to bring up before the Court, at the hearing of the suit, a defendant committed to custody under section 78 of Act VIII of 1859, without having recourse to the procedure under Act XV of 1869.

* Reference from the Judge of the Small Cause Court of Burrisaul, dated the 11th December 1869,

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THE following case was submitted, for the opinion of the High Court, by the Judge of the Small Cause Court of Burrisaul :

" The plaintiff sued the defendant for money due to him on a bond, and took out, under section 75 of Act VIII of 1859, a warrant of arrest before judgment to secure easy execution of decree, were he to obtain it. The defendant, from his poor circumstances, failed to furnish the security required by law, and was therefore, under section 78, committed to custody in the jail. The case then came on for hearing, on the day fixed in the summons, before the Court, but the defendant, from his being confined in the jail, was unable to make his appearance, either personally or by pleader, for defence. The Court, to arrive at a correct decision, adjourned the case to act in pursuance of section 42 of Act VIII of 1859 and paragraph 26 of the Circular Order of 29th July 1859, No. 23, and in order to give the defendant the opportunity of appearing before the Court for his personal examination, and for confronting his opponent, issued an order for the production of the body of the prisoner before the Court to the jailor, in the form prescribed by section 5 (1) of Act XV of 1869, and submitted the same for counter-signature to the District Judge who refused to do the same under the discretion given him by the said Act. The circumstances which necessitated the production of the defendant before the Court, prior to any judgment could be passed by it, were then represented to the District Judge, and his counter-signature on the order was again solicited. This was repeated for the third time, but the Judge declined to yield to the Court's solicitation every time it was

(1) *Act XV of 1869 s. 4.*—" Any Civil in any civil matter pending in a Court Court may, in its discretion, if it appear subordinate to the Court of the District that the testimony of any person confined Judge, or in any Court of Small Causes situate within the local limits of the appellate jurisdiction, if the Civil situate outside the local limits of the ordinary original civil jurisdiction of the Court be a High Court, or if it be not a High Courts of Judicature at Fort William in Bengal, Madras, and Bombay, it shall not be forwarded to the officer to whom it is directed, or acted upon by him until the same shall have been submitted to, and countersigned by, such Judge or the District Judge within the local limits of whose jurisdiction such Court Court to which it is subordinate, is material in any matter depending in such Civil Court, make an order in the form of the said Schedule A., directed to the officer in charge of the said jail."

Section 5.—" When such order is made of Small Causes is situate."

made, and impliedly instructed it to decide the case *ex parte* under section 111 of Act VIII of 1859.

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"The Court still hesitates to proceed according to the way pointed out by the District Judge, because, if such a course of procedure were to be invariably followed, it would, as it humbly thinks, work very prejudicially on the interests of poor defendants generally, who might be helplessly dragged to jail, and there detained until the case be opportunely won against them, and the decree executed without any opposition from them. Thus a door of oppression, as the Court observes, will be widely opened to all evil-meaning plaintiffs who would come forward in numbers before it, with prayers to commit their unfortunate opponents to custody, and to give them the opportunity of easily accomplishing their malicious objects.

"The District Judge declined to countersign the order submitted to him, on the ground, that Act XV of 1869 contemplates the attendance of witnesses only, and not that of defendants. But the wording of the preamble to that Act distinctly provides facilities for obtaining the evidence, and appearance in Court, of prisoners and for service of processes upon them. The meaning of the Legislature involved in the preamble appears to me to apply to the appearance of parties as well as of witnesses, and not to that of witnesses alone, in the absence of any special clause for the same."

The opinion of the High Court was delivered by

JACKSON, J.—This is a reference of a very singular character. A suit was brought against the defendant for money due upon a bond, and, therefore, the Judge of the Small Cause Court at Burrisaul states, "that plaintiff took out, under section 75 of Act VIII of 1859 a warrant of arrest before judgment to secure easy execution of decree were he to obtain it. The defendant, from his poor circumstances, failed to furnish the security required by law, and was, therefore, under section 78, committed to custody in the jail." I hope that the Judge, in this case, has done himself injustice by reason of his inability to express himself clearly in the English language, because section 75 of

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Act VIII of 1859 does not provide for plaintiff's taking out a warrant of arrest before judgment to secure easy execution of decrees, if such decrees are obtained, nor does section 78 of the Code oblige defendants generally to give security. Section 75 only enables the Court, on application made under section 74, "if after examining the applicant, and making such further investigation as it may consider necessary, it shall be of opinion that there is probable cause for believing that the defendant is about to leave its jurisdiction, with the intent of avoiding or delaying the plaintiff, or that he has disposed of, or removed from the jurisdiction of the Court, his property, or any part thereof, with the intent to obstruct or delay the execution of any decree to issue, a warrant to the proper officer enjoining him to bring the defendant before the Court, that he may show cause why he should not give good and sufficient bail for his appearance;" and under section 78, "in the event of the defendant neither furnishing security, nor offering a sufficient deposit, he may be committed to custody until the decision of the suit, or if judgment be given against the defendant, until execution of the decree, if the Court shall so order."

However, the defendant, accordingly, was lodged in jail. Thereupon, the suit proceeded, and the day for hearing arrived. It seems then to have occurred to the Judge, that the defendant being lodged in jail, might be under some disability as to defending the suit effectually. He, therefore, determined to have the defendant brought before him which he seems to have considered could only be done under the provisions of Act XV of 1869, and, thereupon, addressed a requisition to the jailor, which he forwarded for counter-signature to the Judge of the district.

The Judge, instead of pointing out to the Court of Small Causes what seems to me to have been the proper course to be taken, enters into a discussion as to whether the evidence of the defendant was necessary in this case, and being of opinion that the defendant's evidence was not necessary, he declines to countersign the requisition, and returns it to the Small Cause Court.

Thereupon, the Judge of the Small Cause Court, observing

that until summons had been served upon the defendant in the manner prescribed by section 15 of the same Act, he could not decide whether it would be impossible for the prisoner to appear, or no, directed a summons to be served upon the defendant under that section, after which, he said, further orders would be given.

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Thereupon the Head Clerk of the Small Cause Court writes a letter to the Judge, and informs him that the defendant had been served with a summons, under section 41, Act VIII of 1859, and with a warrant under section 75 of the same Act, and on failure of giving security, as required by section 78 of the Act, the defendant has been committed to custody. Thereupon the Small Cause Court makes a renewed application to the Zilla Judge, and repeats the request that he will countersign the order for the defendant's appearance. The Judge again refused in the following words: "There is a distinct power" (*vide* section 111, Act VIII of 1859), in cases in which the defendant neither appears in person, nor by a pleader; section 125 simply says that the Court may examine a party to the suit or his pleader. Such examination is optional. The Circular Orders of 1859 referred to are of date anterior to Act VIII of 1859 coming into operation. There is no material necessity to summon the defendant from jail, and therefore this Court refuses to countersign this order." Apparently, therefore, the Zilla Judge considered that there was no necessity for enabling the defendant to defend himself in a suit, before decree was passed against him; and, thereupon, the Judge of the Small Cause Court, not unnaturally feeling reluctant to pass judgment against the defendant under the circumstances, applies for the orders of this Court.

The defendant, in this case, was not a prisoner under sentence, but was merely detained in the Civil Court jail, under a warrant of the Small Cause Court, in order to answer the suit of the plaintiff. It seems to me quite clear that there was no necessity whatever, in such circumstances, for resorting to the provisions of Act XV of 1869; but that the Judge had nothing to do, but direct the jailor to bring the prisoner before him. Why, under such circumstances, such a correspondence

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should have taken place ; why the Judge should have refused, either to countersign the requisition of the Small Cause Court, or to point out the true course to be taken, seems quite inexplicable. I think we must answer the letter of the Judge of the Court of Small Causes, by desiring that he issue his warrant to the jailor to have the prisoner, confined under his previous warrant, brought before him for the purpose of making his defence, or of retaining proper counsel.

I think we should also direct that this case should be disposed of as speedily as possibly, and looking at the character of the proceedings which have taken place, I think that as soon as the case has been decided the proceedings ought to be sent to this Court for inspection ; and I think that a copy of the judgment of this Court should be sent to the Judge of Backergunge.

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April 14.

Before Mr. Justice Bayley and Mr. Justice Markby.
CHANNU LAL SAHU (PLAINTIFF) v. MANU LAL AND OTHERS
(DEFENDANTS).*

Act VIII of 1859. s. 2—Res-Judicata—Cause of Action.

In execution of a decree, the right, title, and interest of A. in a certain property was sold and purchased by B. In execution of another decree, the right, title, and interest of A. and C. in the same property were sold and purchased by D. In a suit by A. the sale to B. was set aside, but on appeal the decision of the Court of first instance was, upon consent of the parties, set aside and the sale allowed to stand good. D. sued for possession of the share of A. and C. in the property purchased by him, and obtained a decree for possession of the share of C. only. D. now sued to set aside the sale to B. and for possession of the share of A. Held, that the suit was not barred by section 2, Act VIII of 1859.

Umatara Debi v. Krishna Kamini Dasi (1), and Abhiram Dos v. Sriram Das (2), distinguished.

On the 7th June 1858, Manu Lal, defendant No. 1, purchased, at a sale held in execution of a decree, the right, title, and interest of Krishna Prasad Sing, Rameswar Sing, and Thakur Prasad Sing, of and in certain property. On the 5th March 1860,

* Special Appeal, No. 1497 of 1869, from a decree of the first Subordinate Judge of Shahabad, dated the 10th March 1869, affirming a decree of the Moonsiff of that district, dated the 15th July 1868.

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the right, title, and interest of the said Krishna Prasad Sing, Rameswar Sing, and Thakur Prasad Sing, and of Govind Prasad and Raghunath Prasad, of and in the same property, was sold in execution of another decree and purchased by Channu Lal, the present plaintiff, with full notice of the previous sale. Krishna Prasad, Rameswar, and Thakur Prasad, brought a suit for, and on the 7th March 1861 obtained, a decree setting aside the sale of 7th June 1858. On appeal, the decree of the Court of first instance was, by consent of the parties, allowed to be reversed, and the sale was confirmed. On the 7th of April 1866, Channu Lal brought a suit for possession of the shares of Krishna Prasad, Rameswar, Thakur Prasad, Govind Prasad, and Raghunath Prasad, in the property purchased by him, and a modified decree was passed in his favor declaring him entitled to obtain possession of the shares of Govind Prasad and Raghunath Prasad only. On appeal, this decree was set aside. But on the 1st February 1867, the decision of the lower Appellate Court was reversed by the High Court, and the modified decree in favour of Channu Lal was confirmed.

This was a suit by Channu Lal to obtain possession of the shares of Krishna Prasad, Rameswar, and Thakur Prasad, which had been disallowed in the former suit by setting aside the sale of 7th June 1858. The defence was that the suit was barred by section 2, Act VIII of 1859. The Subordinate Judge held that the suit was barred by section 2, Act VIII of 1859.

On appeal, the Judge confirmed the decision of the lower Court.

The plaintiff appealed to the High Court.

Mr. *Paul* (Baboo *Tulsidas Seal* with him) for the appellants, contended that section 2, Act VIII of 1859, did not apply.

Baboo *Mahesh Ghandra Chowdhry* (Baboo *Kalikrishna Sen* with him) for the respondent, contended that the subject-matter of both the suits was the same, and the cause of action, viz., the withholding of possession from the plaintiff of the property purchased by him at auction was the same in both the suits. Section 2, Act VIII of 1859, barred the present suit. *Abhiram*

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Das v. Sriram Das (1), and *Umatara Debi v. Krishna Kamini Dasi* (2), were in point.

The judgment of the Court was delivered by

MARKBY, J.—It appears in this case that on the 7th June 1858, the defendant No. 1 purchased the share of Krishna Prasad Sing and others in certain property. On the 5th March 1860, the plaintiff purchased the share of Krishna Prasad Sing, Raghu Nath Prasad Sing and some other person, that is to say, purchased the same shares as the defendant No. 1 did, and also some other shares. On the 2nd March 1861, the sale to the defendant No. 1 was set aside, but on appeal to the Judge by a compromise between the defendant No. 1 and Krishna Prasad Sing, the decision of the first Court was allowed to be reversed. Subsequently, the plaintiff brought a suit to recover the whole of the property which he purchased on the 5th March 1860 wholly ignoring the sale made on the 7th June 1858, to the defendant No. 1. As to so much of the property as was in excess of Krishna Prasad's share he succeeded, but failed as to the rest, because the Court thought that so long as the sale to defendant No. 1 of the 7th June 1858 stood unreversed, he could not recover Krishna Prasad's share. The present suit is represented to us to be brought in effect to have it established that that sale has been reversed, and the effect of succeeding in this suit would be to get rid of that sale.

The lower Appellate Court has refused to go into the appeal, on the ground that the present claim has been barred under Section 2, Act VIII of 1859, the cause of action of the plaintiff having been heard and determined in the suit just alluded to.

The pleader for the respondent has relied upon two decisions of this Court, the one in *Abhiram Das v. Sriram Das* (1), and the other in *Umatara Debi v. Krishna Kamini Dasi* (2). It seems to us that the present case stands clear of both those decisions. In both those cases the plaintiff had, at the time when the suit was first brought, a complete title to recover the property he sued for, the only difference was a difference in the

(1) 3 B. L. R., A. C., 42,

(2) 2 B. L. R., A. C., 104.

way in which that title was to be established. Here the decision or order, by which the plaintiff's suit, as to Krishna Prasad's share was dismissed, was in effect that so long as the defendant, No. 1, held the sale certificate of the 7th June 1858, no other person could get a title to that property. It is to get rid of that very sale, that the plaintiff brings this present suit. This seems to us, therefore, a different suit than the one previously brought by the plaintiff upon a title of his own which then existed.

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The result will be that the judgment of the lower Appellate Court is reversed, and the case sent back to that Court to be tried, and determined on the merits, the suit not having been barred under the provisions of section 2, Act VIII of 1859.

[FULL BENCH.]

*Before Mr. Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp,
Mr. Justice L. S. Jackson, and Mr. Justice Mitter.*

GUNAMANI DASI (DEFENDANT) v. PRANKISHORI DASI (PLAINTIFF).*

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May 11.

Act VIII of 1859, s. 206—Act XXIII of 1861, s. 11—Payment out of Court—Satisfaction of Decree not certified—Suit to recover Money paid out of Court.

A., a judgment-debtor, paid to B., the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B. failed to certify this payment to the Court, and afterwards executed her decree for the full amount.

In a suit by A. against B. for recovery of the amount previously paid out of Court in satisfaction of the decree, held that, notwithstanding section 11 of Act XXIII of 1861, the suit was maintainable.

THIS was a suit to recover the amount of rupees 980-12-6. The plaintiff alleged that the defendant had a decree against her; and in satisfaction, she (the plaintiff) had paid and delivered to the defendant cash and ornaments to the amount of rupees 980-12-6 by way of compromise. That the defendant afterwards sued out execution of the said decree, when the plea of payment

* Special Appeal, No. 2298 of 1869, from a decree of the Judge of Dinagapore dated the 3rd August 1869, reversing a decree of the Moonsiff of that district, dated the 1st June 1869.

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was overruled by the Court executing the decree for want of proof, and hence the] present suit for refund of the amount so paid as aforesaid.

The defence was that the suit was barred by section 11, Act XXIII of 1861.

The Moonsiff held that, by reason of section 11, Act XXIII of 1861, no separate suit could be brought for the recovery of money paid in satisfaction of a decree without the intervention of the Court; that the question could only be adjudicated by the Court in execution of the decree; and that as the Court executing the decree had overruled such plea for want of proof, no suit could be entertained.

On appeal, the Judge held that the suit lay; and that to succeed therein the plaintiff was to prove, not only that she had made over the property to the defendant, but that the latter had agreed to certify the fact to the Court executing the decree, and had failed to do so. He accordingly remanded the case for trial on the merits.

The defendant appealed to the High Court.

The case came on before a Division Bench (LOCH and MITTEE, JJ.) It appearing that there were conflicting decisions on the question, viz, Whether such a suit was maintainable, the question was referred for the determination of a Full Bench, with the following remarks:—

LOCH, J.—This is a suit to recover from the defendant a sum of money, the value of cash and ornaments, paid by the plaintiff to the defendant, in liquidation of a decree.

It appears that the defendant, Gunamani, held a decree against the plaintiff, who, in liquidation thereof, paid her the sum of rupees 980-12-6 in cash and ornaments; that the defendant, notwithstanding, took out execution of the decree, and the plaintiff's plea of payment was rejected.

It appears, therefore, from the above statement that the adjustment made between the parties out of Court was not certified to the Court by the decree-holders who took out execution of her decree, though she had received payment. The question is whether a suit of this nature can be brought, or whether questions of this kind between the parties, and relating to the

execution of the decree, must not be disposed of under the provisions of section 11, Act XXIII of 1861.

There are conflicting decisions of this Court on this point, and a reference of the question to a Full Bench is consequently necessary. In *Jumeer Mundle v. Brojonauth Chuckerbutty* (1), it was held, by BAYLEY and E. JACKSON, JJ., that no suit would lie, and that all questions relating to sums alleged to have been paid in discharge or satisfaction of a decree shall be determined by order of the Court executing the decree as provided by section 11, Act XXIII of 1861. Another case was decided by the same Judges, *Alumja Beebes v. Gooroo Churn Roy* (2), in which they held the same opinion.

In the case of *Soojun Mundul v. Woojeer Mundul* (3), it was held, by PEACOCK, C. J., and L. S. JACKSON, J., that the plaintiff is entitled to make the defendant to recover damages for breach of his contract to certify, or for fraudulently omitting to certify, in consequence of which, in an execution fraudulently issued against him, his property was seized. In the case of *Bhugoban Tantee v. Gobind Chunder Roy* (4), it was held that a suit would lie. The question was heard before a Full Bench of the High Court of Madras, in the case of *Arunachella Pillai v. Appavu Pillai* (5), where it was held by a majority of three Judges against two (SCOTLAND, C. J., and INNES, J., dissenting), that such a suit was not maintainable. As the practice is unsettled, and there are conflicting decisions, and the point is of importance, we submit the question for the determination of a Full Bench.

MITTEE, J.—I am of opinion that this suit is maintainable in the Civil Court. Whether the defendant had expressly agreed to certify the payment to the Court or not, does not appear to me to be any way material to the right determination of this case. If the facts represented by the plaintiff are correct, it is perfectly clear that the amount claimed in this suit was paid by her to the defendant in satisfaction of his decree, and the receipt

(1) Suth. S. C. C. Ref., 1861—1865, 73.

(4) 9 W. R., 210

(2) 3 W. R., S. C. C. Ref., 3.

(5) 3 Mad. Rep., 188.

(3) 2 Wym. Rev. Civ. & Cr. Rep., S. C.

C. Ref. 21.; S. C., 6. W. R., Civ. Ref., 29.

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of such money by the defendant would be fully equivalent to a solemn agreement on his part not to execute the decree. This agreement, the plaintiff says, has been violated by the defendant; and if this allegation is true, it is equally clear that the defendant has been guilty of a gross fraud, for he had no right to execute his decree in contravention of that agreement.

The question, therefore, is whether the plaintiff is entitled to recover back that amount, either as damages or otherwise, upon the ground of the fraud above referred to. There can be no doubt whatever that, if there is no express legislative provision to the contrary, this Court would be bound, as a Court of equity and good conscience, to answer the question in the affirmative. The defendant can have no right in conscience to retain this amount, in addition to the sum which she has already realized from the plaintiff in execution of her decree, and it would therefore follow that the plaintiff would be entitled to recover it back in some shape or other. The right to that money may have passed to the defendant, but she took it, subject to an agreement which she has most grossly violated, and neither she nor any one else in the world can have any just right to complain, if she is compelled, by a Court of equity and good conscience, to refund it to the party whom she has so grossly cheated.

It has been contended, however, that the hands of this Court are tied up by the provisions of section 206, Act VIII of 1859, and of section 11, Act XXIII of 1861. I see nothing in either of these sections to warrant such a contention. It is to be borne in mind that both those sections are component parts of a Code which purports on the face of it to be a mere Code of Procedure, and it is by no means likely that the Legislature would have introduced any provisions in such a place that would interfere with the power of the Court to grant relief in cases of fraud. But be this as it may, there is nothing in section 206 of Act VIII of 1859, or in section 11 of Act XXIII of 1861, which lays down that a payment, like the one under our consideration is absolutely bad for all purposes, or that the money thus paid shall not be recoverable even when the recipient has committed a gross fraud by violating the agreement under which he received it.

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Section 206 of Act VIII of 1859 says, it is true, that "all moneys payable under a decree shall be paid into the Court, whose duty it is to execute the decree, unless such Court or the Court which passed the decree shall otherwise direct;" but it does not say that payments out of Court are absolutely illegal or improper, for the only penalty it prescribes is that "no adjustment of a decree, either in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court, or be certified to the Court, by the party in whose favor the decree was passed, or to whom it has been transferred." The words "the Court" in the portion just quoted clearly refer to the Court mentioned in the earlier portion of the section, or, in other words, to the Court whose duty it is to execute the decree. This construction is strongly confirmed by the very position which the Legislature has assigned to the section. It forms a part of Chapter 4, which exclusively treats of execution of decrees. The meaning of the section is, therefore, this:—A judgment-debtor should not pay any money due from him under a decree of Court, except through the intervention of the Court, whose duty it is to execute the decree, unless otherwise directed by such Court, or by the Court which passed the decree; and, if he does, no such payment will be recognized by the Court, whose duty it is to execute the decree as a good and valid payment in satisfaction of that decree, unless the decree-holder should choose to acknowledge such payment before such Court.

The plaintiff in this case was certainly guilty of imprudence in not having taken the precautions laid down in section 206, but she has already paid the penalty prescribed by that section for such imprudence, inasmuch as the Court of execution has already compelled her to satisfy the decree, upon the ground that the payment set up by her was not a payment which that Court could recognize as a legal payment in satisfaction of the decree.

What principle of justice can be cited in support of the contention that she is to suffer a further penalty which is not provided for by the law? The carelessness of the plaintiff cannot rectify the fraud of the defendant, and I see no reason why

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she should be permitted to retain a sum of money which she has so grossly misappropriated, assuming, of course, that the facts alleged by the plaintiff are true. The money was given to her for a particular purpose, and she received it for that purpose. She then betrayed the confidence that was reposed in her, for it was certainly her duty to certify the payment to the Court of execution, whether there was an express covenant to that effect or not. The law requires that the payment must be certified to the Court by the decree-holder. The certificate of the debtor is utterly valueless, and the defendant was therefore bound in conscience to give that certificate. That she chose to withhold it was sharp enough, but the plaintiff has already suffered for her negligence by being obliged to satisfy her decree twice over.

The Court which has to try this suit is not the Court of execution, and it is therefore not the Court referred to in section 206. That section was intended to facilitate the satisfaction of decrees of Court, but it has nothing whatever to do with the power of this Court to compel the defendant to disgorge a sum of money which she has no right whatever, according to equity and good conscience, to retain. If she had a right to that money at one time, she has forfeited it by her fraud, or at any rate, she is liable to make good an equal amount to the plaintiff in the shape of damages. To hold that the defendant has acquired a right to retain that money under the provisions of section 206 would be to impute to the Legislature the direct authorization of a fraud, and to cast such an imputation would be contrary to all the recognized principles of construction, particularly when there is nothing in the words of that section to justify such a conclusion.

As to section 11 of Act XXIII of 1861, it runs as follows:—
 “All questions regarding the amount of mesne profits, &c,
 “as well as questions relating to sums alleged to have been paid
 “in discharge or satisfaction of the decree, or the like, and any
 “other questions arising between the parties to the suit in which
 “the decree was passed, and relating to the execution of the
 “decree, shall be determined by order of the Court executing
 “the decree, and not by separate suit.”

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It is clear that every question referred to in this section must have two distinct characteristics, namely, first, that it should be a "question arising between the parties to the suit in which the decree was passed;" and, secondly, that it should be a "question relating to the execution of the decree." Although the words "relating to the execution of the decree" are not to be found immediately after the words "questions relating to sums alleged to have been paid in satisfaction or discharge of the decrees," it is manifest that the questions relating to mesne profits, and those relating to sums paid in satisfaction of decrees, are referred to merely as examples. The word "other" in the expression, "and any other question arising between the parties, and relating to the execution of the decree," clearly shows that all the questions referred to in this section must be of a similar nature, that is to say, they must have the two-fold characteristic mentioned above. But the question which we have to determine in this case is wanting in one of those two characteristics. It is a question between the parties to the decree it is true, but it is no longer a question relating to the execution of that decree. We are not called upon in this case to determine whether the decree has been satisfied or not; but what we have to determine is whether the defendant is not justly bound to refund the amount received by her from the plaintiff, in consequence of the gross fraud she has perpetrated. The first question is a question relating to the execution of the decree, but the second is not. The second question could neither have been raised in, nor determined by, the Court of execution; for all that that Court had to do was to determine whether the decree had been satisfied or not, and it had therefore no jurisdiction to inquire into the *factum* of an uncertified payment which it is expressly told not to recognize as a valid payment, in satisfaction of the decree by the provisions of section 206. It is therefore clear that the question raised in this case is not one which could have been raised in the execution department, and it would be monstrous to contend that the plaintiff is not entitled to have that question determined by some Court at least.

If the payment was utterly null and void, the right to the money did not pass to the defendant, and the defendant is not therefore entitled to retain it, for no question of voluntary pay-

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ment can be raised in such a case. If, on the other hand, the right to the money did pass to the defendant, she is bound to restore it to the party whom she has so grossly defrauded. It has been already observed that the imprudence of the plaintiff cannot rectify the fraud of the defendant, and the above remarks are, I believe, sufficient to show that the question now before us could not have been determined by the Court of execution under the provisions of section 11 of Act XXIII of 1861.

The case of *Marriott v. Hampton* (1) has been much relied upon in the decision of the Madras High Court, quoted by my learned colleague ; but, as far as I can understand that case, it does not appear to me that any question of fraud was raised or discussed in it, and I further find that there was a formal objection to the action, upon the ground that it was an action brought to get back what had been already recovered under a process of law. But the plaintiff in this case is complaining of fraud, and her prayer is not that we should undo what has been already done in the execution department, but that the defendant should be compelled to restore what he has so wrongfully appropriated. Again, in the case of *Marriott v. Hampton* (1), the payment was made before the institution of the suit, and the defendant was bound to plead and prove that payment in his defence. Here the money has been paid after the decree, and the Execution Court could not have entered into the question of this payment, even if it had been raised before it, for its hands were tied up by the provisions of section 306 Act VIII of 1859.

There is no principle of justice that I am aware of, which says that the amount appropriated under such circumstances shall be considered as a lawful gain to the defendant, and this case is therefore clearly distinguishable from that of *Marriott v. Hampton* (1).

As, however, there is a conflict of decision on this point, I concur with my learned and honorable colleague in referring it to a Full Bench.

The question was thus stated:—Looking at the terms of section 206, Act VIII of 1859, with those of section 11, Act XXIII of 1861, if payment be made by a debtor, in liquidation
(1) 7 T. R. 269.

tion of a decree, in whole or in part, or an adjustment be made in satisfaction thereof, and the decree-holder disregarding such payment or adjustment execute his whole decree, whether the debtor can bring an action for damages against the decree-holder in the Civil Court, or whether the question between them as to payment or adjustment, must be considered as a question arising between the parties in execution of a decree to be determined by the Court executing the decree, and not by regular suit.

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Baboo *Mahini Mohan Roy* (Baboo *Rasbehari Ghose* with him) for the appellant relied upon section 11, Act XXIII of 1861, and section 206, Act VIII of 1859, and on *Arunachella Pillai v. Appavu Pillai* (1).

Baboo *Kalikrishna Sen* for the respondent was not called upon.

COURT, C. J.—The case which the plaintiff makes in the plaint is that the defendant had a decree against her, and that the plaintiff paid to the defendant on account of that decree rupees 930-12-6, consisting of cash and ornaments, and so compromised the claim under the decree; that after that, this payment and compromise not being certified to the Court, the defendant sued out execution of the decree, and obliged the plaintiff to pay the amount of, it and the plaintiff seeks in this suit to recover back the money which was first paid, in order to compromise the claim upon the decree. Now it certainly would be most inequitable that the defendant should be allowed to retain, not only the money which she had obtained in execution of the decree, but also the sum of money which was previously paid by the plaintiff, in order to compromise the claim. I think there are grounds upon which we can very properly come to the conclusion that the defendant is not to be allowed to retain that money, and that she is liable to refund it to the plaintiff. According to section 206 of Act VIII of 1859, this compromise or adjustment and payment of money out of Court would not be recognized

(1) 3 Mad. H. C. Rep., 188.

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by the Court, unless it was certified by the defendant, who was the decree-holder. The plaintiff who paid the money had no power to certify it, or to make it known to the Court. I think it was the duty of the defendant to certify that matter to the Court; and that, if the defendant failed to do so, and afterwards took advantage of the want of a certificate, and sued out execution of the decree, and obliged the plaintiff to pay the whole amount, the defendant must be considered as being a trustee for the plaintiff of the money which had been previously paid, and which she had not appropriated to the satisfaction of the decree, and had indeed, by her omission to certify the matter to the Court, prevented from being so appropriated. This is money, which was in my opinion, in the hands of the defendant as trustee for the plaintiff, and which she is bound in equity to refund to the plaintiff. I would prefer putting it on that ground, rather than on that of damages for the breach of a contract, either express or implied, to apply the money paid in satisfaction of the decree, or on the ground of a fraudulent omission to certify, because fraud may not at first have been intended, and it cannot be inferred simply from the defendant's omission to certify to the Court the payment and compromise; she may have omitted to do so through negligence, and the fraud is the subsequently taking advantage of the omission to certify, and enforcing a decree which had really been compromised and satisfied out of Court. There is nothing in section 11 of Act XXIII of 1861 which prevents such a suit as the present from being brought. That section says that "all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order" of the Court executing the decree, and "not by separate suit; but section 206 of Act VIII of 1859 prevents the Court executing the decree from taking any notice of payments not made through the Court, or certified to the Court, and I cannot think that it was the intention of the Legislature that the Courts executing the decree should be bound to hear and determine questions as to payments which by

section 206 they were forbidden to recognize. I think these two sections can only be reconciled by holding that section 11 does not apply to payments made out of Court, and not certified to the Court, and of which it cannot take notice. Therefore, in my opinion, this suit is maintainable to recover back the money, notwithstanding the provisions of section 11 of Act XXIII of 1861. It is maintainable upon principles of equity, and the plaintiff ought to recover.

I would observe, with regard to the case in the High Court of Madras, that Mr. Justice Holloway, for whose judgment I have the greatest respect, seems to treat the case as it was a suit not to recover the money originally paid under the compromise, but to recover back the money which was levied in the execution of the decree. I think that is not the nature of the suit before us ; this suit is to recover back the money first paid, of which the defendant must be regarded as a trustee for the plaintiff, and as such liable to refund it.

The Appeal will be dismissed with costs.

KEMP, J.—I concur in this judgment.

JACKSON, J.—I am of the same opinion. I think it is quite possible to explain the judgments of the majority of the Judges of the Madras High Court, by a reference to the form in which the suit was brought.

It seems to me that, if we were obliged to adopt the construction contended for by Baboo Mohini Mohan Roy, we should be abetting a most serious fraud and injustice ; because there is no question that in this country it is a frequent practice, especially among the poorer classes of suitors, to adjust their decrees out of Court ; and in innumerable cases, they so adjust them, without certifying such payments to the Courts. The Legislature has, no doubt, prohibited the Courts executing a decree from taking cognizance of payments made out of Court, but I think it is the extreme limit of the disability under which the law has placed judgment-debtors, who, trusting in the good faith of the decree-holders, have made such payments out of Court, and that it was never intended to deprive them of all

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remedy as regards payments made under such circumstances. I think there is nothing to prevent those persons who have been so imposed upon by the decree-holder from recovering the money so paid by them in a separate suit. It seems to me quite clear that section 11 of Act XXIII of 1861, and section 206 of Act VIII of 1859, being parts of the same Code, must be read each by the light of the other, and the circumstance of the Legislature having forbidden the Courts executing a decree to take cognizance of payments made out of Court, clearly shows that it cannot have been the intention of the Legislature to leave the final decision upon such questions exclusively in the hands of the Courts executing the decree; but that such questions were left to be cognizable by way of a civil suit.

MITTER, J.—I concur. I have already given my reasons in the order of reference.

[APPELLATE CIVIL.]

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Before Mr. Justice Norman, Mr. Justice Kemp, and Mr. Justice L. S. Jackson.

BIPINBEHARI CHOWDRY (PLAINTIFF) v. RAMCHANDRA ROY AND OTHERS (DEFENDANTS).*

Revenue Court, Jurisdiction of—Benami Lease—Landlord and Tenant—Act X of 1859.

A. brought a suit in the Collector's Court against B., C., D., and E., for arrears of rent in respect of land demised under a potta to F. He joined G. and H. as defendants. According to the terms of the potta they were sureties for F. It was admitted that F.'s name was used *benami* in the potta, and that he took no interest. A. sued B., C., D., and E., as the parties interested and in possession. C. objected that a new settlement had been made, and a new potta granted; that he held a moiety only of the lands, and was not liable for more; and that D. was his ryot, and ought not, therefore, to have been made a defendant. D. and E. contended that they were liable in respect of the lot comprised under the potta, and had already paid rent for it to A. under a decree, but objected that they ought to have been sued separately from B., and C. B. did not appear. The lower Court held that C. had failed to make out his case and

* Appeal, No. 3 of 1869, under section 15 of the Letters Patent, against the decision of a Division Bench, composed of Sir Barnes Peacock, Kt., late Chief Justice, and Mr. Justice Mitter, in Regular Appeal, No. 58 of 1868, dated the 15th February 1869, the said Judges being divided in opinion.

that D. and E. were liable in this suit, and passed a decree, ordering them to pay the amount admitted by them to be due from them; and the other defendants to pay the remainder of the claim. C. appealed. On the appeal, Peacock, C. J., Mitter, J., *contra*, held that the plaintiff's suit must be dismissed, the lease being to F., and not to the defendants; that the Court below had founded its decision on matters extraneous to the lease, which it had no jurisdiction to enquire into. C. appealed under section 15 of the Letters Patent.

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Held by KEMP and JACKSON JJ., that the Collector had full jurisdiction to entertain the suit, which was properly brought against those who were in the actual possession of the land, and that these persons were really the tenants; that the form of the decree passed by the Collector was correct, the plaintiff having consented to the decree being given in that form; that the sureties had really made themselves responsible for those who were really interested under the lease, and not for F.

Prasanna Kumar Pal Chowdhry v. Kailash Chandra Pal Chowdhry (1) distinguished.

Held by NORMAN, J., (*dissenting*) that the terms of the lease under which F. was alone interested could not be contradicted by oral evidence; that F. alone was bound to the lessor under the lease; that the defendants could not be sued as tenants, unless, subsequent to the potta and kabuliati, something had occurred creating the relation of landlord and tenant between them and the lessor; that no such relation or any contract creating such relation between the parties could be implied from the circumstances of the case, and the suit should be dismissed. The Revenue Court, had, therefore, no jurisdiction. But whether in the Revenue or Civil Court D. and E. could not be sued jointly with B. and C., nor could G. and H.

THE plaintiff, Bipinbehari Chowdry, as manager on the part of Nawab Nazir Siddi Nazir Ali Khan Bahadur, of Ballygunge, brought this suit in the Court of the Deputy Collector of Basirhaut, against Prasanna Chandra Roy Chowdry, guardian and Sarbarakar to the estate of the late Mathuranath Chowdry, Pryanath Chowdry, Jaggat Tara Chowdrain, and Padma Kumari Roy Chowdrain, as alleged holders under a *ganthi* (2) potta, and against Debnath Roy and Ranchand Roy, as sureties, on whose security the potta was said to have been granted to the other defendants.

The suit was instituted on the 25th of September 1867, to recover rent, from 1st Baisakh to Chaitra 1273 (April 13th, 1866 to March 1867), alleged to be due under a potta purported to have been granted to Chandra Prasad Bose, but it was alleged by all parties that his name only was used, and that the defendants

(1) Case No. 236 of 1866; 23rd September 1867.

(2) A potta at a fixed rent and hereditary tenure.

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were the parties to whom the land had in reality been leased. There was a kabuliat in terms of the potta. Subsequently to granting the potta, the Nawab sold his zemindari rights to the present plaintiff. The suit was valued at rupees 8,327-12-5.

In the plaint it was alleged that the amount of 6,000 bigas of cultureable land, out of about 18,650 bigas in the Sunderbun lots, recorded in the map of Captain Hodges; under Nos. 94, 95, 96, and 97, well known by the names of Hasnabad, Mohunpore, Shulkuly, and Kuley Danye, purchased by the plaintiff's employer, was taken at the rent of rupees 4,500 at the rate of 12 annas per biga, and the jungle lands therein at 10 annas per biga, by the *gantidar* (1) defendants, under potta and kabuliat, on 21st February 1858, in the name of Chandra Prasad Bose, on the security of the *jamindar* (surety) defendants, stipulating that they should pay the rent of the excess lands to be found on measurement of the whole lands in 1270 (1863) at the rate of 10 annas per biga. That, accordingly, on measurement, the quantity of the land was found to be 19,317 bigas 14 katas; and, therefore, the whole annual rent was fixed at rupees 12,823-9, viz., rupees 4,500 for the said 6,000 bigas, and rupees 8,323-9 for the remaining 13,317 bigas, 14 katas. That a suit for arrears of rent for the year 1270 and 1271 (1863-64) had been brought, and a decree obtained against the defendants. That the defendants had paid off the amount decreed; but that the balance, with interest, for 1273 (1866), which, after deducting the amounts paid per account paper, amounts to rupees 8,327-12-5, had not been paid, though repeatedly called for.

The plaintiff deposed as follows:—

“The defendants, Mathuranath, Prynath, and Prasanna Chowdry, and Jaggat Tara Chowdrain took in *ganti* tenure, under potta granting kabuliat, 6,000 bigas, at the annual rent of rupees 4,500, at the rate of 12 annas, and 1,265 bigas, at the rate of 10 annas, in all at the annual rent of rupees 5,290-10, in Sunderbun lots Hasnabad, Mohunpore, Shulkuly, and Kuley Danye, the zemindari of my employer Nazar Ali Khan Bahadur, and are in possession thereof in jote since 1258 (1851). The quantity of 667 bigas 14 katas was found to be in excess over

(1). An occupant of lands at a fixed rent and by heritable tenure.

and above the quantities stated above on measurement in the year 1270 (1863). Deducting the payments for the year 1273 (1866) the amount of the arrears is rupees 7,590-2, on the land stated above, and the amount of rupees 417-5 on the excess lands, at the rate of 10 annas; in all the amount of rupees 8,007-7, arrears of rent, is due from the defendant; no separate writing has been made regarding the excess lands found on measurement. The defendants are bound to pay the rent of the said lands under the conditions of the kabuliata. I obtained a decree, and have realized the rent of the said excess lands for the years 1270 and 1271 (1863-64); the claim will be proved by receipts and documents, and witnesses. I know not whether Mohunpore is held by Jaggat Tara and Padma Kumari, separate. I have no objection to receive from Jaggat Tara and Padma Kumari the amount of rent admitted by the deponent on the part of the said Jaggat Tara and Padma Kumari to be arrears on the lands of Mohunpore held in their possession. I know not what amount has been found to be excess in each of the lots on measurement."

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The defendants, Jaggat Tara Chowdrain and Padma Kumari Chowdrain, relied on the fact that of the lots mentioned in the plaint they were in possession of lot 95 alone; that under a previous decree of the High Court, dated 12th March 1866, in Appeal No. 398 of 1865, they had been already held liable to the plaintiff for arrears of rent for that lot. They admitted their liability in respect of that lot, but contended that they ought to have been sued separately.

Their agent, Sheikh Tamijooddin, deposed: "My employers held jointly with other shareholders the Sunderbun lots Hasnabad, Mohunpore, Sulkuly, and Kulley Danye, the property of Nazar Ali Sahib; but the said estate has been divided among the shareholders and my employers. Jaggat Tara and Padma Kumari have got and hold Mohunpore only, separate, under *batwara*."

Jadab Chandra Roy, authorized agent of Roy Pryanath Chowdhry, stated: "Formerly Roy Pryanath Chowdhry held the quantity of bigas 18,650 on *jumma*; the quantity of bigas 667-14 found to be excess in the recent measurement made in the absence of my employer, is held by him as his *jummai*

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land. The rental of the tenure formerly was rupees 12,823-9, but in the recent settlement made by the said Khan Bahadur, the net rent has been fixed at rupees 10,408-13-6, reducing the rate, that is 10 annas in the place of 12 annas, and 8 annas in that of 10, cancelling the former potta. The moiety of the said tenure is held by Roy Mathuranath Chowdry and others, and the other moiety is held by my employer. Rupees 2,503-6-9 is the net amount of arrears up to 1273 (1866) on the lands comprised in the share of my employer. The *gantidari* right in the said four lots is held by my employer and Roy Mathuranath Chowdry; Jaggat Tara has no *gantidari* right in the said lots, and is not a shareholder therein. Jaggat Tara Chowdrain having got part of the lands of lot Mohunpore on *jumma* from my employer, holds possession thereof, and pays the rent to my employer. She is merely a ryot holding the said lands in Mohunpore." He admitted the *ka buliat* executed by Chandra Prasad, and stated that Kazim Ali, whom he had called as witness, was the adviser of the plaintiff, and received any deposits made into his hands.

The defendant Mathuranath Chowdry entered no defence.

The Deputy Collector fixed the following issues:

1. Whether the plaintiff had made a new settlement and granted a new potta to the defendants at the annual rent of rupees 10,408-13-6?
2. Whether the land in dispute had been on measurement found to be in excess of the original quantity, and whether the defendants were bound to pay the rent thereof?
3. Whether the defendants, Jaggat Tara and Padma Kumari were entitled to pay to plaintiff the rent of their share of the estate admitted by them?

He held, on the first issue, that the defendant, Pryanath Chowdry, had failed to prove the new potta relied on by him, which, admittedly, was not registered. On the second issue, that Pryanath Chowdry admitted the excess of 667 bigas 14 katas found on measurement, but pleaded the measurement was made in his absence. But as he had stated (by his agent) that the new settlement was made with him by plaintiff including the excess land, his plea of the measurement having been made in his

•absence failed. On the third issue, after reference to the High Court's decree, dated 12th March 1866, that the defendant Jaggat Tara and Padma Kumari were, on their admission that they held a share of the lands in suit, liable to pay the rent of the land held by them separately to the plaintiff. He, therefore, ordered "that of the claim, the sum of rupees 1,824-6, with proportionate costs, be decreed to the plaintiff against Jaggat Tara and Padma Kumari : and the remaining portion of the claim, with proportionate costs, be decreed against the other defendants. Further, be it known, that defendant Mathuranath has entered no defence, and the case is decided as regards him *ex parte*."

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The defendant Pryanath Chowdhry, and after his death his sons and legal representatives, Roy Bhupendra Nath Chowdhry, and Roy Ganendra Nath Chowdhry, and Roy Narendra Nath Chowdhry, appealed to the High Court.

PEACOCK, C. J., relied on *Prasanna Kumar Pal Chowdhry v. Kailas Chandra Pal Chowdhry* (1) and *Roy Priyanath Chowdhry v. Prasanna Chandra Roy Chowdhry* (2), and held that the plaintiff's suit ought to be dismissed, on the ground that Chandra Prasad Bose being the person to whom the land was leased, and who agreed to pay the rent, was by law the tenant ; and that there was no proof that the defendants ever made known to the plaintiff that the lease was taken *benami* for them ; and that the Deputy Collector had founded his decision on matters extraneous to the lease, which he had no jurisdiction to enquire into. He, therefore, reversed the decision of the Deputy Collector.

MITTER, J., was of opinion that *Prasanna Kumar Pal Chowdhry v. Kailas Chandra Pal Chowdhry* (1) and *Roy Priyanath Chowdhry v. Prasanna Chandra Roy Chowdhry* (2) did not govern the case ; that, under Act X of 1859, suits for rent could only be brought in the Collector's Court against the actual tenants themselves. Here Chandra Prasad Bose was on all sides admitted to be a mere *benamidar*, who had no interest whatever in the properties covered by the lease, and was therefore not the actual tenant within the meaning of the Full (1) Case No. 236 of 1866 ; 23rd September 1867. (2) 2 B. L. R., A. C., 237.

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Bench decision referred to ; and the question whether he was tenant or not, did not therefore arise ; that the Deputy Collector had jurisdiction to try the suit, which was brought against those actually in possession of the land as tenants.

Both Judges were of opinion that no suit would lie in the Collector's Court against the surety defendants.

The opinion of the Chief Justice prevailed, and plaintiffs appealed under section 15 of the Letters Patent of 1865, against his decision.

The *Advocate-General* (with him Baboo *Ashutash Dhur*) for the appellant.—The suit ought not to have been dismissed. The decree of the Deputy Collector was wrong in so far as it was not a joint decree against all the defendants except the *jaindar* (surety) defendants who are now out of the suit. In this respect the decree of the Deputy Collector should be amended. In a previous suit for the rents of 1270 and 1271 (1863 and 1864) which was decreed, the two ladies, Jaggat Tara Chowdrain and Padma Kumari Chowdrain, intervened, and they are now properly made defendants. The suit is rightly brought in the Revenue Court for rent in respect of the use and occupation of land, against those who are really interested in the land as shown by their actual use and occupation of it.

They only are the actual tenants within the meaning of Act X of 1859. There is no misjoinder ; the different parties are not sued in respect of their separate lots. The suit is brought against all the tenants jointly, and a decree ought to be given against them jointly because the plaintiff could only sue for rent of the lands as mentioned in the lease, and has no cognizance of any separation in interest which may have taken place subsequently to the granting of the lease without his sanction. To recognise such a severance would be to create a new tenancy. It is admitted by all parties that Chandra Prasad Ghose has no interest whatever in the land ; that he was a mere *benamidar*. If a suit had been brought against him on the ground that he and he alone had entered into an express contract with the plaintiff under the potta and kabuliati, it would have been sufficient for him to answer, " you knew at the time that only my name was

to be used and that I personally was to have no interest under the lease." *Prasanna Kumar Pal Chowdhry v. Kailas Chandra Pal Chowdhry* (1) went mainly to show that equities cannot be determined in a Revenue Court. Here no question of equity arises. The suit is simply against those who were found to be the actual tenants of the land and against whom previous decrees for rent in favour of the plaintiff had passed. *Judoonath Paul v. Prosunnouth Dutt* (2) and *Sedee Nazeer Ali Khan v. Bajah Ojoodhya Ram Khan* (3) were also referred to.

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Baboos *Ashutash Chatterjee* and *Khettranath Bose* for the representatives of Roy *Pryanath Chowdhry*, respondents, contended that *Chandra Prasad Bose* whose name only was mentioned in the lease, was the person against whom the suit ought to have been brought. The plaintiff seeks to make the defendants liable solely on account of their having a beneficial interest in the land leased, and this is a question which the Deputy Collector had no jurisdiction to entertain. *Prasanna Kumar Pal Chowdhry v. Kailas Chandra Pal Chowdhry* (1). *Pryanath Chowdhry* could not be made liable for rent of excess lands, the measurement having been made in his absence. The defendants, *Jaggat Tara* and *Padma Kumari*, were not shown to be the tenants of the plaintiff; the decree against *Pryanath Chowdhry* had gone mainly on the admission of these defendants of their liability. This was an injury to him.

The *Advocate-General* in reply.—The Chowdrys could not be injured by a joint decree passed against them and the ladies. The ladies must do one of three things: First, they might pay for more land than they admittedly held,—this would positively benefit the Chowdrys who would contend that the ladies could not recover money paid by them voluntarily in their wrong, and with the knowledge that they were not liable; secondly, they might pay for lot 95 alone, in which case the Chowdrys would be still uninjured, for they would only have to satisfy the decree

(1) Case No 236 of 1866; 23rd September 1867.

(2) 9 W. R., 71.

(3) 8 W. R., 399.

1870 to the extent of their own admitted liability ; thirdly, the ladies might pay for less than the amount of land contained in lot 95 for which they admitted their liability. The Chowdry could then recover from them the amount they would have to pay in excess of their own share, to satisfy the decree ; and would rely on the ladies' own admission against themselves.

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NORMAN, J. (after briefly stating the facts) continued :—The first question we have to consider is what is the effect as between the plaintiffs and the defendants of the lease taken by Chandra Prasad. It may be quite true that as between Chandra Prasad and the defendants, or some of them, Chandra Prasad may have no interest, and his name may have been used merely for the convenience of the persons really interested. But as between the plaintiff and Chandra Prasad the question is totally different. The person to whom the lessor granted the lease was Chandra Prasad. Chandra Prasad, and Chandra Prasad alone, agreed for the payment, and bound himself by the stipulations in the lease. The defendants did not enter into any contract with the lessor. They did not choose to bind themselves. The sureties do not bind themselves for the payment of rent and performance of the covenants by the defendants, but only for the acts of Chandra Prasad, and would apparently be discharged from liability by such a dealing by the lessor with Chandra Prasad as the principal, as would, according to the ordinary rules of law, discharge the surety of any other principal. Whatever may be the case upon the question of property as between the defendants and Chandra Prasad or the defendants and third persons, as between the lessor and Chandra Prasad, the contract is a reality.

The Advocate-General argued that the Chief Justice was in error in saying that the land was demised to Chandra Prasad, and that he covenanted to pay the rent. The argument comes to this, that the potta and kabuliati, by which that demise was created, might be contradicted by oral testimony as to what the real contract was. Now this cannot be done. It is a well established principle of law, which has been recognized in this Court, that evidence is never admissible to show that a person

who appears on the face of a written contract to be personally a contracting party is not really a contracting party, and, therefore, not liable as such upon the contract. It is quite another matter whether evidence may be admitted to charge another person as the principal.

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The contention that the defendants, in the name of Chandra Prasad Bose, stipulated to pay the rent now sought to be recovered, being for the excess land on certain conditions, is in my opinion wholly untenable.

I think, that under the potta and kabuliat as they stand, Pryanath and Mathuranath acquired nothing, and did not render themselves liable to pay rent to the lessor.

If the rent had not been paid to the lessor by Chandra Prasad or his heirs, the lessor might have had a right to resort to the defendants, and to hold them liable. But that is a right arising out of the peculiar relations of the several parties to each other, not a right which can be enforced under Act X of 1849. Under the 23rd section of that Act, clause 4, suits for arrears of rent due on account of land are made cognizable by the Collector alone. That section does not empower the collector to try any question except between a landlord and his tenant. He is not empowered to entertain suits, nor is the jurisdiction of the ordinary Civil Courts taken away, in respect of any collateral contracts, or the obligations arising out of any relation that may exist between the parties beyond that of tenancy in respect of which rent is claimed.

In the present case, I think that Pryanath and Mathuranath could not have been sued in the Collector's Court for rent by the lessor, unless some thing occurred subsequent to the potta and kabuliat to create the relation of landlord and tenant between themselves and the lessor.

If, after the grant of the potta, the lessor discovered that Chandra Prasad was merely in name the lessee; that he was an agent by a contract in whose name the defendants had obtained possession of the property demised to him; If Chandra Prasad or Chandra Prasad's heirs, as appears to have been the case here, had disclaimed all interest in the property; if the defendants had paid their rent to the lessor, and the lessor had accepted

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In the present case, I think that Pryanath and Mathuranath could not have been sued in the Collector's Court for rent by the lessor, unless some thing occurred subsequent to the potta and kabuliat to create the relation of landlord and tenant between themselves and the lessor.

If, after the grant of the potta, the lessor discovered that Chandra Prasad was merely in name the lessee; that he was an agent by a contract in whose name the defendants had obtained possession of the property demised to him; If Chandra Prasad or Chandra Prasad's heirs, as appears to have been the case here, had disclaimed all interest in the property; if the defendants had paid their rent to the lessor, and the lessor had accepted

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the same from them as his tenants, the defendants might have rendered themselves directly liable for rent ; but if so, so far as that liability would be one enforceable by ordinary suit for rent in the Collector's Court, it would only be upon a new contract to be implied from their acts and those of the lessor. If, in the present case, any new contract could be implied from the conduct of the parties in paying and receiving rent, or otherwise, I think the action might be maintained. But it is plain that the parties are not agreed as to the terms of any new contract.

In the former suit for the rents of 1270 and 1271 (1863-64), the plaintiff joined in one comprehensive plaint Saroda Prasad, the heir of Chandra Prasad, the defendants Mathuranath and Pryanath, and the sureties. Down to the date of that suit, it is evident that there was no new contract in which Pryanath and Mathuranath were treated as the contracting parties liable for the rent. Baroda Prasad disclaimed all interest, and was released. There was a decree against Pryanath and Mathuranath, and if the matter had rested there, and Pryanath and Mathuranath had paid subsequent rents on the footing of that decree, it may well be that they or their representatives might have been sued at the present day as tenants. But the plaintiff appealed, and the ladies, Jaggat Tara and Padma Kumari, put in a petition alleging that they also were tenants, and should be made liable jointly with Pryanath and Mathuranath. A Division Bench of this Court made the ladies jointly liable as to part of the rent with Pryanath and Mathuranath, but to that Pryanath and Mathuranath have never assented, either directly or indirectly. In the present suit, the plaintiff seeks to charge the representatives of Pryanath, the representatives of Mathuranath, and the two ladies, Jaggat Tara and Padma Kumari Chowdrain, as jointly liable.

As it cannot be shown that the parties agreed to the same terms, there is no contract, and therefore I must say that no new contract has been substituted for the original one ; nothing has taken place to alter the relation of the parties, according to which Chandra Prasad was the contracting party, the tenant liable for the rent, and the defendants or some of them being

the persons who had used his name, were bound to indemnify him, and liable in equity to answer for the payment of the rent by Chandra Prasad to the Plaintiff.

Under Act X of 1859, a Collector has no jurisdiction to adjudicate upon the rights and liabilities arising out of such relations. The extent of the liability of the several defendants depends on the extent of their interest in the tenure. For the determination of the question whether either, and which of them, is liable, and if so, to what extent, according to the decision in the Full Bench case already quoted, recourse must be had to the ordinary civil tribunals which have cognizance of all civil cases in which their jurisdiction is not expressly taken away.

I may add that it is a general rule that Courts of Law will not take cognizance of distinct and separate liabilities in one suit, and neither in the Civil Court, under section 8 of Act VIII of 1859, nor in the Collector's Court, under any law that I ever heard of, can a cause of action against A. and B. for one demand be joined with a cause of action against A., B., and C., or a cause of action against C. alone. They are not causes of action against the same parties. In my opinion the claim against Jaggat Tara and Padma Kumari for the rent of a portion of the tenure cannot be joined in the same suit with the cause of action against Pryanath and Mathuranath or their representatives.

I think it clear that Pryanath had a right to insist that he and Mathuranath were alone liable for the rent, and that he is not liable as to any part of the rent jointly with Jaggat Tara and Padma Kumari. If these ladies are his tenants, it is clearly prejudicial to him that they should be permitted to pay rent directly to the superior holder. It would tend to nothing but confusion of rights if any thing of the sort could be allowed. It would materially affect the value of Pryanath's tenure if he were going to sell it, if it were found that another person was paying rent for a portion of it. Mr. Justice Mitter says :
" Rightly or wrongly, the Deputy Collector has passed a decree against those two ladies, and as they are satisfied with it, the appellant Pryanath ought not to be allowed to complain,
" when it is clear that the effect of that decree has been to

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“reduce his liability.” But, I think that a man, who if liable at all, is liable solely, has a right to insist that he shall not be made liable jointly with a stranger. He has a right to say, “I do not choose to run the risk of the costs of an action for contribution to which I shall be exposed, if a joint decree passes against myself and another, if that other chooses to pay the whole debt.”

In English Courts of Justice, it has long been settled that if an action is brought against two persons on a contract alleged to be joint, if one allows judgment to go by default, or expressly admits the debt, and the case goes on against the other, whose liability to the entire debt is proved on the trial, but it is shewn that the party against whom judgment has gone by default, and who has admitted the debt, is not jointly liable, judgment cannot be given as against the defendant who has appeared and defended, jointly with the one who has no defence, but the suit must be dismissed altogether—see *Shirreff v. Wilks* (1) and *Gray v. Palmers* (2)—unless the plaintiff is allowed to amend by abandoning his suit against the other defendant as was the case in *Greaves v. Humfries* (3).

I think that as regards the surety defendants the Deputy Collector had no jurisdiction. I may add that they are sureties for Chandra Prasad and his heir, and that by the discharge of Chandra Prasad's heir, Baroda Prasad, all remedy against them is gone.

I, therefore, think that the Chief Justice was right in holding that the suit must be dismissed, and I would affirm his judgment with costs.

JACKSON, J., (after stating the facts continued):—In determining this appeal, it is necessary first to consider whether the Full Bench Ruling (4) cited governs the case; and, second, whether the suit was in fact beyond the competence of the Collector's Court.

It must be borne in mind that the case was before this Court in regular appeal; that, for this reason, all questions of fact, no

(1) 1 East, 52.

(2) 1 Esp. Rep., 135.

(3) 4 E. & B., 851.

(4) Case No. 236 of 1866; 23rd September 1867.

ess than of law, were open to consideration by the Division Court, and consequently by us, on the appeal; and especially that the contract between, and the liabilities and remedies of, the parties must be viewed and considered in accordance with the principles and practice administered by the Courts in Bengal. I think there is a clear distinction between the present case and that decided by the Full Bench. In the latter case, the plaintiff having granted a potta to Gopal Chandra Mookerjee and having treated him as the tenant, having also made a petition to the Collector to sell the patni for rent due from Gopal Chandra, afterwards brought a suit for subsequent arrears against Gopal and Paran Chandra Pal Chowdry and his wife, alleging these two persons to have beneficial interest in the lease. The wife denied having any interest at all, the plaintiff proposed to abandon his claim against her, but the husband insisted that the liability of both should be tried. There was thus a real contest for the purpose of establishing a liability on the part of a defendant, who denied it, and who was not *primâ facie* liable for the rent; and evidence was, consequently, gone into, to show from what sources the purchase-money came, and upon a question whether the wife had independent means, or had a joint treasury with her husband. The Full Bench was then asked to decide, among other things, "whether the Collector was competent to try whether Paran Chandra Pal Chowdry alone was beneficially interested in the patni; upon the ground that whatever interest his wife might have had in it was *benami* for him; or whether Paran Chandra and his wife were jointly beneficially interested, or, if not jointly, what was their respective interest therein, for the purpose of ascertaining whether Paran Chandra and his wife were jointly liable for this rent, or whether they were to be rendered liable according to their respective beneficial interest in it." This question was answered in the negative, after some debate whether it really arose in the case. I was one of the Judges who gave that answer, and I said: "It seems to me to be such a case as is not within the jurisdiction of the Collector, who is restricted to try questions between a landlord and his actual tenants, persons between whom, directly or indirectly, some engagement has been entered

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“ into. But where the landlord seeks to make other persons liable
“ by reason of their having a beneficial interest in tenure, he must
“ resort to the assistance of the regular Civil Courts, which take
“ cognizance of all causes of action of which their cognizance is
“ not expressly taken away ;”—and I think that is also the effect of
the answer as given by the other Judges.

In the present case the facts are very different ; not only does no one defendant repudiate liability (on the contrary, as remarked by the Chief Justice, liability is eagerly claimed by all the defendants), but the liability of each defendant has been affirmed in previous decisions between the parties, the only dispute being not between the plaintiff and the defendants or any of them, but between one of the defendants who claims for himself and a co-defendant (who has not appeared) the exclusive liability and of course exclusive beneficial interest under the lease, and the two female defendants who claim interest and admit liability, but allege their liability to be limited and separate, though they do not set up any legal foundation for that part of their allegation.

There is not, therefore, as it seems to me, the least necessity, in this case, for dealing with any such question as was held by the Full Bench in the case cited to be beyond the cognizance of a Court of Revenue.

It is necessary now to enquire whether, on any other ground, there was defect of jurisdiction in the Collector ; and I must observe that none of the parties having objected to the jurisdiction, but the suit having gone on trial, it seems to me very doubtful whether it would be just to dismiss the suit with costs of both Courts, even if the want of jurisdiction were manifest. In my opinion, the Collector was fully competent to hear and determine the suit, and I apprehend that the Revenue Courts have tried by thousands, and are every day trying, suits where, either landlord or tenant is a *benami* holder ; in other words, where on one side or the other of the contract, the name used is not that of the real contracting party. In this very large class of cases, it seems to me that the rule in regard to the admission of parol evidence to vary written contracts will not apply ; and I conceive that the decisions refusing to allow an agent, who

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enters into a written contract, in which he appears as principal, to offer parol evidence for the purpose of exonerating himself, are wholly wide of the case before us. There is, in my opinion, no question here of surrender, nor of substituting one contract for another. The principle of one of the common forms of *benami* contract in this country is that A. contracts with B., though by the desire and for the convenience of one or other of those parties the name of C. is used instead of the name of that party (1). It is clear that, in such a case, C. did not contract at all. He was not the agent for either, but was, and is, a stranger to the whole business. And that this was so as to Chandra Prasad, the *Furzi* (ostensible principal) in the present case, is clear not only from his own statement and that of his personal representative after his death, in a former suit for rent of the same lands, but from the allegations of all the parties to this suit; and from the history of the tenancy, there can be no doubt whatever that Chandra Prasad never had and never claimed the slightest interest in the lease. Nor, as I think, was he in any sense an agent for the lessees; in truth he did not act in the matter at all for himself or for others, but the real principals, with his permission, used his name.

But it seems to me the case does not rest merely on the contract. The plaintiff alleged, and the defendants admitted, that they had got the land, and surely the holding of the land admittedly under the plaintiff entitled the plaintiff to the rent. There is a case, *Judoonath Paul v. Prosunnuth Dutt* (2), where, under a *benami* contract, the landlord recovered rent from the parties in possession, although no previous realization of rent from them was proved. The case before us is a great deal stronger, for the plaintiff has got previous decrees against all the defendants, and it is noticeable that, in the case I have just referred to, the Full Bench decision, which is supposed to be an authority for the judgment now under appeal, is cited and

(1) See the case of *Sheikh Bahadoor Ali* Bruce, at pages 72-3 of the judgment in *v. Sheikh Dhomun*, 1 Sel. Rep., 250, and *Gopee Krist Gosain v. Gunga Persaud Mussamut Hyatun v. Mohummed Hussun Gosain*, 6 Moo. I. A., 58; Note by L. S. Khan, 4 Sel. Rep., 134, and see the repealed Regulation XVII of 1793, sec. 27; (2) 9 W. R., 71. see also the observations of L. J. Knight.

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declared to be in accordance with the principles on which the learned Judges there proceeded. And where the admitted occupancy of the lands indicates the real tenancy, and corroborates the statements of the parties as to the true contract, I cannot conceive any reason why the plaintiff should be debarred from recovering his rent in the Collector's Court.

This, be it remembered, was not a mere suit for arrears of rent as originally reversed, nor a suit for the purpose of establishing the liability of the defendants, for that had been determined in the previous suit. It was occasioned by the defendants setting up a recent settlement, which, according to their contention, entitle them to a lower rate; and also partly, no doubt, by the reluctance of Pryanath Chowdhry to admit that he held jointly with the two ladies. I conceive that the plaintiff's right to recover rent from the defendants was based upon their occupation of the land, their acceptance of the covenants and liabilities of tenancy, and the previous decisions on that point; and that the production of the kabuliat was only necessary for the purpose of shewing what the terms of the agreement were. Indeed, regard being had to the facts, and to the previous decisions between the parties, I imagine that the plaintiff might very well have dispensed with the production of the kabuliat altogether.

It seems to me, therefore, that the main question in this case was a question of fact, namely, whether there was evidence of the joint liability, alleged by the plaintiff, on the part of all the defendants.

In my opinion, there was such evidence in the admissions of the defendants themselves, in the sworn statements of the agents who were examined, and in the previous judgments; nor do I think that, if we got over the first difficulty of making a decree at all in this case, there can be any question of what the decree should be. The defendant Praynath, no doubt, repudiates any joint liability with the two ladies, but I conceive that he has no grievance in the terms of a judgment which, while it tends to lessen his liability for the particular rent sued for, decides nothing as between himself and the co-defendants so as to prejudice him in any future litigation regarding the interests claimed

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by them respectively. As to the two ladies, they expressly admitted a joint liability in the first instance, though they set up a subsequent partition, to which the assent of the landlord was not alleged, as far as they were concerned; therefore I conceive there was nothing in the way of making a decree against them on their own admissions; and if it had not been for the plaintiff's consent, I should have thought that a decree against the defendants jointly would have been the proper termination of the suit. It is not, indeed, very easy to account for the form of the previous decree of this Court between the parties, dated the 12th March 1866, nor is it precisely apparent in what position as to execution the parties were left by that decree. We may assume, however, that for some reason or other the parties there acquiesced in a decree so worded, and probably the rent was paid without further objection. It is not perhaps, necessary to decide here what decree could have been made if it had been quite clear that the two ladies were not tenants, and could not, therefore, be jointly liable for the rent. But I think, that the procedure of our Courts quite admits of such a result as a judgment against one or more of several parties charged as jointly liable, the suit as against the rest being dismissed in consequence of their liability not being made out. And in the particular case before us I think it would have been obvious that the plaintiff was compelled, by what had previously occurred, to sue all the defendants.

I, therefore, think the decision complained of must be reversed, and the judgment of the Deputy Collector restored (the plaintiff having expressly consented to the decree being given in that form, see the last sentence but one of his examination (1) and not now offering any objection to the decision that Jaggat Tara Padma Kumari do pay a certain part and the other defendants the rest), the only exception being as to the amount alleged to have been paid to the plaintiff's agent as to which, as suggested by Mr. Justice Mitter, there must be further inquiry.

Of course in the view which I have taken of the case, the parties sued being held to be (with the knowledge of the sureties) the real contending parties, it follows that the sureties

(1) *Ante* p. 237.

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 RAMCHANDRA ROY. KEMP, J.—I concur in this judgment.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

EDWARDS v. MULLER.

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 July 6

*Commission—Examination de bene esse—Evidence—Act VIII of 1859,
 ss. 175, 179.*

A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a Commission.

In this suit, Mr. Edwards, the plaintiff in the cause, had been examined *de bene esse* under a commission prior to his departure for England. The deposition so taken was now tendered in evidence.

Mr. Hyde for the defendant objected.—Under section 173 (1), it appears clear that the party about to leave ought to be examined by the Court itself; the Court has no power, under Act VIII of 1859, to appoint a commission for the examination of a witness *de bene esse*. The sections relating to the appointment of commissions for the examination of witnesses are sections 175—179, inclusive, and a state of circumstances under which a commission might issue are three: 1st, when a witness is resident

(1) *Act VIII of 1859, s. 173.*—"If a witness forthwith or on any day that witness be about to leave the jurisdiction may be fixed for that purpose, of which of the Court, or other good and sufficient cause can be shown, to the satisfaction of the Court, why his examination should be taken immediately, it shall be competent to the Court, upon the application of either party, or of the witness at any time, after the institution of the suit, to take the examination of such witness may be fixed for that purpose, of which due notice shall be given to the parties if the day be fixed in their absence. The witness shall be examined, and his deposition shall be taken down in writing in the manner herein before prescribed; and the deposition so taken down may be read in evidence at any hearing of suit."

more than a hundred miles from the place where the Court is held ; 2nd, when the witness is unable to attend before the Court from sickness or infirmity ; and 3rd, when a witness is specially exempted by reason of rank or sex. In all these cases it is impossible or inconvenient for the witness to be examined personally by the Court. The Court, therefore, allows a commission to issue. But in the case of a witness being about to leave the jurisdiction of the Court, there is no reason why the Court should not itself examine him. The Legislature has, accordingly, made this distinction ; not being willing to forego the advantage of giving the Court the opportunity of observing the demeanour of a witness, except where constrained by necessity so to do.

Mr. Phillips, *contra*.—The 173rd section has a different object. It provides for the admissibility of depositions without proof that the witness is out of the jurisdiction at the time of the trial. The 174th section provides for the general case, where the witness is unable to attend at the trial from sickness and other sufficient causes, and the terms of the section are wide enough to include the case of a witness leaving the jurisdiction, and to entitle the Court to issue a commission. The practice has been to issue commissions in such cases as the present, and no doubt has ever been raised as to the powers of the Court.

Mr. Hyde in reply.

PHEAR, J, said, after some consideration, he was of opinion that the evidence was not admissible. Not having been taken before the Court, the deposition was not admissible, except by consent. It was usual, in cases of this sort, for parties to waive objection on this ground at the time that the order for the commission was obtained ; but it appeared that nothing of the kind took place in this instance. (1)

Attorneys for plaintiff : Messrs *Robertson and Co.*

Attorney for defendant : Mr. *Leslie*.

(1) The attention of the Court does not appear to have been called to the inherent jurisdiction of a Court of Equity to issue a Commission to take evidence *de bene esse*. See *Gresley on Evidence in Courts of Equity*, p. 90 ; *Bowden v. Hodge*, 2 Swanston, 258 ; *Cox v. Champneys*, 6 Mad. and Gel., 262 ; and see *Mitford on Pleading* (fourth edition), pp. 52, 149, 150, and cases there cited ; and *Jeremy's Equity*, p. 272.

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June 9.

Before Mr. Justice Norman.

RUPLAL KHETTRY AND ANOTHER v. MAHIMA CHANDRA
ROY (1).

Interim Injunction to stay Sale.

The plaintiffs, who were in possession of certain premises, brought a suit to restrain the defendant from selling a share in them which he had attached in execution of a decree upon a mortgage to him of that share, and to set aside the deed of mortgage. According to the plaintiffs' case, they (the plaintiffs) were in possession under a decree of Court obtained upon a mortgage executed to them by the executor of the will of the last proprietor under a power contained in the will, and the mortgagors to the defendant, who were the brother and the son of the testator, had no interest in the property at the time of their mortgage to the defendant. The plaintiffs applied for an *ad interim* injunction, and the court granted the application.

THIS was an application for an injunction to restrain the defendant from selling certain property, *viz.*, a house No. 8-12, in Raja Gurudas's Street, until the suit in which the plaintiffs claimed an interest in the property should have been heard.

One Kisto Chandra Das died in 1865, leaving three sons, Radhanath, Bonomali, and Troyluckonath. He left a will, by which he left his son, Radhanath, absolute devisee of his property, which included the said house, and against which his son, Bonomali, caused a *caveat* to be entered, but he afterward withdrew it, and probate was granted of the will on April 28th, 1865. In August 1866, Radhanath died, leaving a will, by which he made Troyluckonath his executor, giving him, under

(1) In an application of the same kind made before Markby, J., in *Sreenarain Chuckerbutty v. A. B. Miller*, on March 22nd, 1870, it appeared that the plaintiff was formerly a member of a joint Hindu family, but that many years ago partition had taken place; that subsequently to the partition, the plaintiff had purchased the property, consisting of certain houses, with his own money, and had been in undisputed possession of it ever since; that the property had been attached by the defendant, the assignee of the estate of R. Dodd and other insolvents, in execution of a decree obtained by the insolvents against one Mirtunjoy Chuckerbutty, the brother of the plaintiff; that the plaintiff had filed a claim which had been disallowed; and that the plaintiff had then brought the present suit to have his right, title, and interest in the said property declared and for an injunction to restrain the defendant from selling it. The property was at the time of the application advertised for sale by the defendant. Markby, J., said, he thought the real question was whether the interests of the parties would suffer by the sale; the plaintiff might be injured by the sale, but the creditors could not be prejudiced by staying the sale. He, therefore, granted the application. Costs to be costs in the cause.

• certain circumstances, the power to mortgage the said house. He left one son, Megnath, by whom a *caveat* was entered against the will, but probate of the will was granted on August 18th, 1866. Troyluckonath, under the power given him in the will of Radhanath, mortgaged the said house to the plaintiffs, to secure an advance of rupees 6,500, on August 17th, 1867. Default was made in the payment of the mortgage money, and the property was put up for sale by auction, by the plaintiffs, under the power of sale contained in their mortgage deed, but was not sold as the defendant set up a claim to it. The plaintiffs thereupon brought a suit for foreclosure on May 16th 1868, in which they obtained a decree for foreclosure on June 11th, 1868, which was made absolute on July 15th, 1869, and they obtained a decree for possession on September 9th, 1869, and were in possession at the time of the present suit. Megnath and Bonomali had, meanwhile, on March 26th, 1867, executed a mortgage of two-thirds of the said premises to the defendant. Default being made in payment of the mortgage money, the defendant brought a suit, to which the plaintiffs were not made parties, and obtained a decree for sale on January 6th, 1868. On April 23rd, 1870, the defendant advertized that two-thirds of the said house would be sold in pursuance of his decree. The plaintiffs thereupon brought the present suit for an injunction to restrain the sale, and they prayed that the mortgage deed of March 26th, 1867, might be brought into Court and cancelled.

Mr. *Kennedy*, for the plaintiff's contended that these mortgagors had had absolute property in the premises he mortgaged to them, under the wills of Kisto Chandra and Radhanath; that a cloud would be thrown on the plaintiffs' title by allowing the mortgage of the 26th March 1867 to stand good, and permitting a sale of the premises—*Hone v. O'Flahertie* (1); that the plaintiffs should have been made parties to the foreclosure suit in which a decree had been obtained on January 6th 1868; that considerable injury would result to the plaintiffs by the sale, but that the defendant would not be injured by an

(1) 9 Ir. Ch. Rep., 119; S. C., on appeal, *id.*, 497.

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injunction being granted to restrain the sale until the title had been tried ; and that if the Court refused the injunction, it would be permitting the sale of property to which no title had been shown by the decree-holders.

Mr. *Woodroffe*, for the defendant, contended that the case of *Hone v. O'Flahertie* (1) laid down no general principle, and did not apply as an authority to the present case ; that the decree for foreclosure obtained by the plaintiffs had been obtained by them with knowledge of the defendant's claim, and without notice to him, or making him a party to the suit ; that the executors being merely Hindu executors took no estate in the property left by the will—*S. M. Jaykali Debi v. Shibnath Chatterjee* (2) ; that it was necessary to show that irreparable injury would be done by the sale, and that the person asking for an injunction had acted with promptitude, which had not been done in this case as the cloud on the plaintiff's title arose, if at all, in May 1868, when the defendant interfered to prevent the sale by the plaintiffs, yet until now they had taken no steps to remove it.

Mr. *Kennedy* in reply—If the plaintiffs had made the defendant a party to their suit, it would have been multifarious ; but the defendant might have made the plaintiffs parties to his suit. It is not necessary to show that irreparable injury would be done by allowing the sale ; it is enough that the plaintiffs would be injured as to their title ; they will be in a worse position if the sale is permitted. There has been no delay on the plaintiffs' part, as they were not bound to take any steps until now. The delay, if any, has been rather on the part of the defendant, who having obtained a decree in January 1868 does not proceed to execution of it until April 1870. The balance of inconvenience is in our favor, for a postponement of the sale would not injure the defendant, nor deteriorate the property, while a sale before title was proved would do plaintiffs considerable injury. [NORMAN, J., referred to *Best v. Drake* (3).]

NORMAN, J. (after stating the facts).—The case, by arrangement of the parties, stood over till to-day, and the question is now

(1) 9 Ir. Ch. Rep., 119 ; S. C. on appeal, *id.*, 497.

(2) 2 B. L. R., O. C., 1.

(3) 11 Hare, 369.

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whether the plaintiffs are entitled to an injunction to restrain the sale until the rights of the parties are determined by this suit. The case is one of considerable difficulty. Mr. Kennedy for the plaintiffs could not support his contention by any case bearing directly on the point, and Mr. Woodroffe has argued with great force and ingenuity that the Court has no power or ought not to interfere. It is not without very considerable hesitation that I have come to the conclusion that I ought to stay the sale until the rights of the parties have been determined. I think it would be an abuse of the process of this Court, and would tend to create mischief, if I were to allow the sale to proceed by the Registrar under the decree in the suit upon the mortgage, when it is made plain to me that there is the strongest reason for supposing that the defendants have no title. This is not a case in which the Registrar sells the right, title, and interest of a person only. By the form of the decree he is to sell the mortgaged hereditaments, or a part thereof. On the same principle, that it is the duty of a person, who has rights in property advertized for sale in execution of a decree, to claim the property under section 246 of Act VIII of 1859, and if his claim is disallowed to bring a suit within one year, from the time of the disallowance, which would be probably before the sale took place, it appears to me that it was the duty of the plaintiffs to set up their title to prevent the public from being defrauded, or themselves from having to litigate with a pauper. It appears to me that I must be guided by the question of convenience, or inconvenience which was the principle in the case of *Bacon v. Jones* (1), and I, therefore, grant the injunction. Great injury might result to the plaintiffs if I did not interfere, and a great fraud may be committed on the purchaser. I think no injury can result to the defendant by my granting this injunction. On these grounds, therefore, though with some hesitation, I grant the injunction until the rights of the parties have been determined. The costs of both parties will be costs in the cause.

(1) 4 M. & Cr., 433.

Before Mr. Justice Phear.

IN THE MATTER OF THE SHIP "PORTUGAL."

1870
May 5.

Bottomry Bond-holder—Ship, Sale of—Master's Lien for Wages—Priority.

The charterer of a ship advanced money to enable her to complete the voyage and obtained as security a "bottomry bond" signed by both the master and owner. On the completion of the voyage, the charterer got the ship arrested and sold, and the money was brought into Court. Before any order had been made for the payment of the proceeds out of Court, the master also had got the ship arrested at his suit for wages due, but no decree had been obtained. Subsequently, the charterer, without notice to the master, obtained an order of Court for the payment of the proceeds of sale to satisfy his bottomry bond. Thereupon, the master applied to restrain the charterer from taking the money out of Court, until the claim for wages had been first satisfied. *Held*, that the master had a lien on the proceeds for wages due to him at the time of the sale of the ship, prior to that of the bottomry bond-holder, and that he was entitled to have the proceeds retained in Court until the hearing of his claim.

Mr. Phillips had, in this case, obtained a rule *nisi* for an injunction to restrain the holder of a decree obtained in a suit on a bottomry bond on a certain ship, called *The Portugal*, from taking out of Court the proceeds of the sale of the ship, which sale had been made by order of the Court passed in the said suit.

The ship had been chartered by one Mahomed Hossein, for a voyage from Calcutta to Jedda and back, with the option of calling at certain ports, both going to and returning from Jedda. On the voyage to Jedda, the ship put into one of the intermediate ports, where it was found necessary that she should undergo some repairs, for which the necessary funds were supplied by the agent of the charterer at that port. The master had also been compelled to borrow from the passengers during the subsequent voyage to Jedda, in order to meet necessary expenses. The charterer met the ship at Jedda, where further supplies were found necessary for the prosecution of the voyage. Accordingly, the master by advertisement solicited tenders for the loan of a sum of money; and an offer made by the charterer, in competition with others, was accepted. Finally, a bottomry bond was executed by the master, with the consent of the owner, in which were included the sums spent for the repairs of the ship which had been found necessary at the intermediate

port, and which had been supplied as above described. The bond was signed both by the owner and the master, and thereby the master purported to bind himself, his executors and administrators, and it contained a proviso that if either of them paid the sum secured by the bond, it should be void. The ship, therefore, proceeded on her voyage back to Calcutta. On her arrival there the charterer proceeded *in pœnam* on his bond, arrested the ship, and obtained an order for sale. The sale, accordingly, took place, and the money was ordered to be paid out of Court to the holder of the bottomry bond in satisfaction of his claim. The master had, subsequently to the decree on the bottomry bond, put in his claim for wages, and finding that an order had been made for payment out of Court of the proceeds of sale, of which order he had had no notice, he had applied for and obtained the present rule.

Mr. *Cowell* showed cause against the rule, and it was then found necessary to adjourn the hearing for the production of the bond and for allowing affidavits to be filed, but nothing further appeared in the decree material to this report. On the adjourned hearing,

Mr. *Phillips*, in support of the rule, contended that the rule that the most diligent creditor is to be first paid did not apply where the debts were of unequal rank. The Court will let creditors come in at any time while the fund is in Court.—*Seton on Decrees*, 128. *The Saracen* (1). That case was decided before the passing of the Admiralty Court Act, 1861, which made applicable Part 9 of the Merchant Shipping Act, 1854, and thereby extended the equitable jurisdiction. [PHEAR, J.—Does that affect the Vice-Admiralty Jurisdiction?] It is submitted that it does. The claim for wages is preferred to that of a bottomry bond-holder even after decree obtained by the bottomry bond-holder as is clearly shown by *The William Safford* (2) The bond is invalid, no money having been advanced on the credit of the ship—*Abbott on Shipping*, 131; *The Augusta* (3); and the bond-holder being indebted to the owners of the ship—

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(1) 2 Rob. Adm. Rep., 451; S. C., on appeal, 6 Moore's P. C., 56. (2) 1 Lush. Adm. Rep., 69. (3) 1 Dods, 283.

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Abbott on Shipping, 132; *The Hebe* (1); *The Royal Arch* (2); and the whole of the money not having been really paid—Abbott on Shipping, 134; *The Jonathan Goodhue* (3). The latter case is distinguishable, in that the allowing the master's claim would have been inequitable, but it is not so here. The terms of the bond there were much stronger, and the equity therefore against the master. But the Court will consider the equities and may, if it thinks fit, marshal the securities: *The Edward Oliver* (4). The bond is the owner's bond practically: the master signed as a matter of form, and notwithstanding his having signed, he retains his priority. The master's affidavit shows he was deceived and only signed on the representation that he would retain his priority. The learned counsel also referred to the cases of *Dodson v. Lyall* (5); *The Madonna d'Idra* (6); *The Mary Ann* (7); *The Priscilla* (8); *The Constantia* (9).

Mr. Cowell, *contra*.—The bottomry bond is a valid one, and the holder is entitled to priority. The master has made himself liable on the bond, and therefore cannot compete with the bondholder in asserting a lien; see *The Jonathan Goodhue* (3), where the master made a claim, and was opposed by the bondholder, in whose favor it was ruled by Dr. Lushington, that the master having hypothecated by his own act the ship and freight, and also rendered himself personally liable, could not claim to take the sale proceeds for his benefit and to the injury of the bondholder: Abbott on Shipping, 620. Even if the master ever had a lien, he lost it, when the bondholder obtained a decree: Abbott on Shipping, 619; Coote's Admiralty Practice, 113; *The Saracen* (10). Diligence in procedure to decree is rewarded in the Admiralty Court with priority of claim against the proceeds—Machlachlan on Shipping, 569.

(1) 2 Rob. Adm. Rep., 146.

(2) Swab., 278.

(3) *Ibid.*, 524.

(4) 1 L. R., Ad. & E., 379.

(5) 8 Jur., 969.

(6) 1 Dods, Adm. Rep., 37.

(7) 9 Jur., 94.

(8) 1 Lush. Adm. Rep., 1.

(9) 2 Rob. Adm. Rep., 405.

(10) 2 Rob. Adm. Rep., 451; S. C., on appeal, 6 Moo. P. C., 56.

There is no marshalling securities here ; the bond-holder was not indebted to the owner. The owner had drawn a bill for rupees 3,000 as freight on the bond-holder. A lien is extinguished by the sale of the *res* by a competent Court, and by want of diligence in the suitor : Coote's Admiralty Practice, 6. In this case only a fraction of the master's claim was for wages earned during the voyage. His services therefore did not operate for the protection of the bond-holder's interests, see Abbott on Shipping, 620.

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Mr. Phillips, in reply, referred to the cases of the *Gratitudine* (1), *The Feronia* (2).

PHAR, J.—I think Mr. Phillips' client is entitled to the injunction for which he asks, and that the rule *nisi* should be made absolute. Hossein Ibrahim chartered the Ship *Portugal* in December 1868, for a voyage to Jedda and back, calling at certain ports at the charterer's choice, both on the outward and homeward voyages. The ship started on her voyage in February 1869, with Mahomed Hossein as master, and also with her owner on board. She arrived at Jedda in April 1869, and there she met the charterer. At that time it seems to have been found by the owner and the master that they had not sufficient funds to enable them to bring back the ship on her return voyage, and after an advertisement, to which I need not further refer now, an agreement was entered into by the charterer to advance the necessary money, and, on July 12th, what is said to be a bottomry bond, was signed both by the master and owner in favor of the charterer. The ship left Jedda on July in her homeward voyage, and arrived in Calcutta in September. In November the charterer proceeded against the ship in this Court, in its Vice-Admiralty jurisdiction, on the bond of the 12th of July. The ship was arrested ; the usual appraisal and sale took place, and a decree was made in favor of the charterer. After this and before any order was made for the payment of the proceeds of the sale out of Court, the master also got the ship arrested at his suit, but no decree was made thereon.

(1) Tud. L. C. Mer. & Mar., 50.

(2) 2. L. R. Ad. & E., 76.

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After this had taken place, the charterer, without notice to the master, obtained an order of Court for the payment to him of the proceeds of the sale of the ship, and the present application is that he be restrained from taking out the money under that order. I think, as I have already said, he must be restrained, because, in my opinion, the effect of the decree in his favor was merely to put him in possession of the ship, which then existed in the shape of money in Court, and that he had that possession subject to all liens that were prior in rank to his own claim. Mr. Cowell referred me to the case of *The Saracen* (1) and one or two other cases in support of the contention that the decree made in favor of the charterer gave him priority over all other claims against the ship. I think that these cases are correctly distinguished from the present one by Mr. Phillips, for in them the priority which the decree was allowed to give was simply priority against claimants of co-ordinate rank. It was simply that priority which all Courts of Common Law give to the most diligent suitor. The decree-holder got possession of the ship, and as against all persons with co-ordinate claims which they had been careless of asserting, he was entitled to pay himself in full before they could be considered. But I think this is not so against persons who have claims against the ship of a higher rank and priority to his own. In the case of *The Aline* (2), Dr. Lushington points out very clearly that a party who had obtained a decree against a ship for damages, still held the ship under that decree subject to the lien of a bottomry bond-holder, where the bottomry bond had been entered into after the occurrence of the collision. It appears to me that following the reasoning of Dr. Lushington, I must hold that the possession which the charterer has obtained, by virtue of the decree of this Court, is subject to all liens which are prior to the lien of the bottomry bond-holder, and there is no doubt that the master's claim for wages, during the time when he was engaged in the service of bringing the vessel safe to port, is a claim which is prior to that of the bottomry bond-holder. Upon this I think that Mr. Cowell has not made any

(1) 2 Rob. Adm. Rep., 451.

(2) 1 Rob. Adm. Rep., 111.

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contest. It follows, therefore, that Mr. Phillips' client is entitled to have the proceeds kept in Court, until he has made out his claim. No doubt, Mr. Cowell did urge that in this case the master had bound himself personally in the bottomry bond, and had in that way waived his claim for wages as against the bottomry bond-holder, or at any rate given the bottomry bond-holder priority. But I think there is no ground for contending in this document that the master has bound himself personally. I think it is extremely doubtful, if it were matter now before me, whether, under the circumstances, the charterer was a party who could advance money on a bottomry bond. He appears to me to have been, pending this voyage, in the position of a temporary owner, and if it had come to be a contest between the parties, whether or not the so-called bottomry bond was in law a bottomry bond, which entitled the owner to proceed against the ship in the Admiralty Court, would be a matter which would require great consideration. I think it right to add that, on the last affidavit (what may be in those I have not read, I do not know) I abstain from saying that the bond-holder did actually advance the money. Be this as it may, as I have already said, the master is entitled to have his claim for wages first satisfied. The rule must be made absolute, and with costs, because the bond-holder ought not to have applied to take the money out of Court without notice to the master. That he had notice of the master's claim Mr. Carapiet's affidavit puts beyond doubt, and as it is a claim which I think is well founded in law, the bond-holder must pay the cost of having caused the master to litigate it. I may throw it out as a doubt, however, whether as against the bond-holder the master is entitled to claim for wages after the time when the ship was first arrested; but I think he is certainly entitled to his wages up to that time.

Rule absolute.

Attorney for the master : Mr. Carapiet.

Attorneys for the bond-holder : Messrs. Berners & Co.

[FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice E. Jackson. and Mr. Justice Markby.

RAJKUMAR RAMGOPAL NARAYAN SING (PLAINTIFF) v. RAM DUTT CHOWDHRY AND ANOTHER (DEFENDANTS).*

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June 14*Mortgage—Agreement not to alienate.*

By an agreement reciting that A. had executed a bond in favor of B, for a certain sum of money, A. "in order to repay the bond-money in the terms in the bond contained," declared that, "until the repayment of the money covered by the bond, he should not, from the date of the agreement, convey the property mentioned therein to any one, by deed of sale, or deed of conditional sale, or mokurrari potta or deed of mortgage or suripeshgi ticoa potta. Should he make all these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid and as executed in favor of nominal parties for evading payment of the money covered by the said lands."

Held (MARKBY, J. doubting) that the instrument operated as a mortgage to A of the lands comprised therein.

No precise form is required to create a mortgage.

On the 10th Baisakh 1265, F. S. (8th April 1858), Mussamat Bhagabati Kunwar, guardian of Mussamat Jorowan Dye, minor, lent and advanced to Murlidhar and his co-parceners rupees 3,000. In consideration of the loan, Murlidhar and his co-parceners executed a bond for the amount, and also an agreement, a translation of which is as follows:

"This is executed by Murlidhar Jha, Haldhar Jha, Lalji Jha, "and Mussamat Sachi Ajhan, mother and guardian of Jata-sankar Jha, inhabitants of Mauza Lakhmipore, *alias* Norowni, Pergunna Pariharpore Raghov. Further, we have taken "rupees 3,000, on a bond duly executed, dated 10th Baisakh "1265. We have paid the same to Mussamat Sri Jorowan "Dye, of Mauza Singhara, Pergunna Bharwara, Mahajan "(creditor). In order to repay the bond-money specified above, "in the terms in the bond contained, we declare that until the "re-payment of the money covered by the bond, we shall not,

* Regular Appeal, No. 138 of 1869, from a decree of the Subordinate Judge of Tirhoot, dated the 30th March 1869.

“ from this day, convey the Bramatwar lands settled by Govern-
 “ ment, and not settled, within the areas of Mauza Koosail,
 “ Mauza Bhadyan, Mauza Choapta, Pergunna Bassawtar, and
 “ Nanpore, and Jabdi, which are to this day in our posses-
 “ sion and seizin, to any one, by deed of sale, or deed of condi-
 “ tional sale, or mokurrari (potta) or deed of mortgage, or zuri-
 “ peshgi or ticca potta. Should we make all these transactions
 “ with respect to the above-mentioned lands, the deeds thereof
 “ shall be considered invalid and nominal, made for the purpose
 “ of stomaching the said bond-money. To this purport, we
 “ give in writing these few words in the nature of an ikrarnama
 “ in order that they may be of use when required. The 10th
 “ Baisakh 1265.”

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On the 23rd Aswin 1271, F. S. (20th October 1863), Murlidhar executed a deed of *Bharna*, or usufructuary mortgage, of the property comprised in the above agreement, in favor of Ram Dutt Chowdhry. On the 2nd January 1864, Ram Dutt Chowdhry executed a sub-lease of the said premises in favor of Alexander Urquhart. Mussamat Bhagabati Kunwar sued Murlidhar and others for recovery of the principal and interest secured by the bond, and, in default of payment, to cause the property mentioned in the agreement to be sold in satisfaction of the debt. On the 20th August 1864, a decree was passed in the suit declaring the property to be liable to sale in satisfaction of the debt. On the 4th and 5th December 1865, the property was put up for sale and purchased by Rajkumar Ramgopal Narayan Sing, the plaintiff herein, but he was kept out of possession by the defendants. Hence the present suit, on the ground that the usufructuary mortgage executed in favor of Ram Dutt Chowdhry being subsequent to the ikrarnama (agreement) under which the lien had been acquired, was inoperative as against the plaintiff.

The defence set up was (*inter alia*) that the plaintiff had purchased with notice of the existence of the defendant's claim under the usufructuary mortgage; that the ikrarnama relied upon by the plaintiff was not a *bonâ fide* instrument; that the property in dispute was not pledged thereby; that the conditions contained in that document were not beneficial to the plaintiff's cause; and

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that the terms of the *ikrarnama* did not preclude Murlidhar from executing the usufructuary mortgage.

The Subordinate Judge held that the *ikrar* was a covenant whereby the debtors had agreed not to alienate their lands until payment of the debt; that the deed had been so loosely drawn that it could not be called a mortgage, but a collateral security in a different shape; that by the terms of the deed, the debtors were restrained from making temporary arrangement by way of *Bharna* lease; that such an arrangement did not impair the value of the property, nor did it impede the operation of the creditor's lien; and that the plaintiff had purchased with notice of the claim. He held that the temporary arrangement must stand good, and, accordingly, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court. The case came on for hearing before a Division Bench, and it being brought to the notice of the learned Judges (BAYLEY and MARKBY, JJ.) that there were conflicting decisions upon the point, whether a bond for payment of money, with a simple covenant not to alienate until payment, constitutes a mortgage, referred the question to a Full Bench—Whether the document of the 8th April 1858 is to be considered a mortgage of the lands comprised therein? The question was referred with the following remarks by

MARKBY, J.—In this case, the plaintiff sued for possession of a share in certain lands, and to cancel a deed of *Bharna*, or usufructuary mortgage, dated 20th October 1863, executed in favor of the first defendant by one Murlidhar and others, and also to cancel a *katkina potta*, on sub-lease, executed by the first defendant in favor of the second defendant.

The plaintiff purchased at a sale in execution of a decree on the 5th December 1865. The decree under which the sale took place was dated the 20th August 1864. It was based on a bond, dated the 8th April 1858 (10th Baisakh 1265), and by it the property in dispute was declared specially liable to be sold in satisfaction of the debt.

Prior to the commencement of the suit upon the bond, but subsequently to the execution of the bond, the same parties who

executed the bond executed a mortgage by way of lease of the property in dispute to the defendant No. 1, who subsequently granted a lease to defendant No. 2. The defendants acted in good faith and without notice of the bond of 8th April 1858 (10th Baisakh 1265), and defendant No. 1 paid a valuable consideration for the lease. The defendants were not parties to the suit in which the decree of 20th August 1864 was passed.

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A translation of the bond of 8th April 1858 (10th Baisakh 1265, F. S.) has been agreed upon by the pleaders for the purposes of this case, and it is as follows :

" We Murlidhar and others, this day duly executed a bond to, and borrowed and received the sum of rupees 3,000 from, Musamat Bhagabati Kunwar. We hereby agree that, until the repayment of the said bond-debt, we shall not, from and after this date, alienate the Bramatwar lands settled and not settled within the area of Mauza, &c., which have been all along held by us up to this date, to any, by deed of absolute sale, conditional sale, or mokurrari or mortgage, or ticca pottas on receiving zuripeshgi ; if we do any of these things with respect to these lands, such instrument shall be invalid and of no avail and if executed shall be deemed invalid and a benami transaction set up to avoid payment of the debt by sale, mortgage or otherwise, all our lakhiraj resumed lands situated in Mauzas Koosail, Bhadyan and Choapta, which we hold on our account."

The property in dispute is resumed lakhiraj land situated in Mauza Koosail, and settled with Murlidhar Jha and the other parties to the bond.

The Subordinate Judge dismissed the plaintiff's suit. He appears to doubt whether this document specifies with sufficient accuracy the property to which it applies ; but he holds that, whether or no this be the case, it does not amount to a mortgage, but only to a covenant not to alienate. Accordingly, he holds the usufructuary mortgage of the first defendant to be a good and valid mortgage, notwithstanding the bond and decree and the sale thereunder to the plaintiff, and dismisses the suit.

Upon appeal before us, it has been contended, first, that the document of 10th Baisakh 1265 (8th April 1858) when read

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by the light of the subsequent conduct of the parties, ought clearly to be considered as a mortgage ; and, therefore, that the plaintiff bought clear of any subsequent incumbrance ; secondly, that the description of the property was sufficiently specific ; thirdly, that the document itself, on the face of it, ought to be considered as creating a mortgage. The respondent supported the judgment of the Court below, and also contended that, even if the transaction did constitute a mortgage, the defendant, as a *bonâ fide* purchaser for value without notice, had a good title as against the plaintiff, who, as purchaser at an execution sale, only took the rights and interests of the execution-debtor as they stood at the date of the sale. For the last point, he relied on *Erskine and others v. Dhun Kishen Sein* (1), but that case is opposed to a long string of authorities in this Court ; and the learned Judge, Mr. Justice Mitter, who concurred generally in that decision, has, I believe, since intimated that, in that respect, he considers the decision wrong. I have no hesitation, therefore, in holding that, if the transaction in question was a mortgage, the plaintiff ought to succeed. I am of opinion that there is no evidence of any conduct of the parties from which we are at liberty to draw an inference as to what their intention was. The only conduct which has been referred to was subsequent to the mortgage under which the defendants claim. On the other hand, I think that if there was a mortgage, the property was sufficiently described. The case is quite distinguishable from those referred to, where the party professed to mortgage "all his property" without any specification of the locality or nature of the property.

The only question which remains is, whether the document, on the face of it, is a mortgage. I should be inclined to hold that it is not. I think we could not hold it to be so without abolishing distinctions which are well understood, and which are important. I concur fully in the observations of the Judges of the late Sudder Court in the case of *Gunga Persaud Singh v. Lalla Beharee Lal* (2). It is there said "as a general rule, we adhere to the principle laid down in the case of *Chunder Kishore v. Surma Roy v. Goorchurn Shah* (3) that the title of a person who

(1) 8 W. R., 291. (2) S. D. A., 1857, 825. (3) S. D. A., 1855, 353.

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“ purchases in good faith is not vitiated by any contract into which
“ the vendor may have previously entered with a stranger binding
“ himself not to alienate his property. If a party is desirous
“ of obtaining a valid lien on any particular property, he should
“ adopt the simple means which the various kinds of mortgage
“ in use in this country afford. If he does not choose to do so,
“ the fault is his own, and the innocent purchaser should not
“ be made to pay the penalty of his negligence.” It is true,
as was pointed out by Mr. Gregory, there is the distinction
between that case and the present, that the covenant here is not
to alienate until the money is repaid, whereas there the cove-
nant was not to alienate until the Privy Council decision was
given; but the distinction does not appear to me to be a very
important one, and the very sound remarks which I have above
quoted seem to me applicable to the case now under consideration.
The case of *Chunder Kishore Surma Roy v. Goorchurn Shah* (1),
which is above referred to, is on all fours with the present
case, and these two cases seem to have been somewhat over-
looked by Mr. Justice Macpherson in his work on mortgages.

There is, however, a decision of a Division Bench in this Court
in *Bolakee Lal v. Chowdhry Bungsee Sing* (2), in which a differ-
ent view appears to have been taken. There, on a document which,
as far as I can discover, was substantially in similar terms to the
present, it was held that the transaction amounted to a simple
mortgage. There are also some decisions of the Courts in the
North-Western Provinces which take the same view (see Mac-
pherson on Mortgages, page 40, 5th edition).

I think it very desirable that it should be clearly understood
whether a bond of payment of money, with a simple covenant
not to alienate until payment, constitutes a mortgage: I would
therefore, refer the following question to the consideration of the
Full Bench:

Is the document of the 8th April 1858 to be considered a
mortgage of the lands comprised therein?

If the judgment of the Full Bench shall be in the affirmative,
then the decision of the Court below will be reversed, and the

(1) S. D. A., 1855 353.

(2) 7 W. R. 309.

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plaintiff will have a decree for possession with costs in both Courts, and the case will be remanded for assessment of mesne profits. If the judgment of the Full Bench shall be in the negative, then the appeal will be dismissed with costs.

BAYLEY, J.—I agree in the proposed reference to the Full Bench.

Baboo Annada Prasad Banerjee, for the appellants, contended that the deed was a mortgage.—Macpherson on Mortgages, page 36, 4th edition, and cases there cited, *Bolakee Lal v. Chowdhry Bungee Sing* (1). The intention of the parties is to be looked to. [COUCH, C. J.—With reference to the language of the instrument and the surrounding circumstances.] Two deeds were executed at the same time, one a bond, and the other the agreement in question. If we look to the interpretation which has been given by the Courts upon the words used in the agreement, we shall find that it has invariably been given in favor of a mortgage. It is a practice to word a mortgage in the same manner as the instrument in dispute, and that practice has been recognized by the Courts. What could possibly have been the reason for entering into an agreement of this nature, unless the parties understood that it would carry some effect? The bond itself was a security for the money, and if a further or collateral security was not intended, the agreement was an unnecessary document. The decision in *Ohundur Kishore Surma Roy v. Goorchurn Shah* (2) is not applicable to the present case. There the instrument contained a covenant that the debtor would not alienate any property whatever; there was no specification of the property. Here the property upon which the lien was intended to be given was defined.—Macpherson on Mortgages, page 42, 4th edition. The intention was to give a priority. [COUCH, C. J.—Suppose the intention was not to give any lien or right of priority, what sort of expression would the debtor have used?] Of course the same language would have been used. [COUCH, C. J.—In that case how can we say that the intention was to create a lien.] A similar document has been held to

(1) 7 W. R. 309.

(2) S. D. A. 1855 353

be a simple mortgage and to give a prior lien—*Laljee v. Gorind Ram Janee* (1). The case has been referred to a Full Bench on apprehension of the decisions being conflicting, but there is no conflict. The case of *Ohunder Kishore Surma Roy v. Goorchurn Shah* (2) does not clash with the other decisions.

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Mr. Allan (with him Baboo Abinash Chandra Banerjee for the respondent) contended that words should have their plain meaning, unless some obscurity or injustice was apparent. The document only restricted the debtor against alienation. It created no lien—Macpherson on Mortgages, page 36, 5th edition, and cases there cited. The form of a simple mortgage is given in Macpherson on Mortgages, Appendix, page 235. If this document be looked upon by the test given in Powell on Mortgage, Volume I, page 58, it would be reduced to a simple agreement creating no lien—*Gungapersaud Sing v. Lalla Beharee Lal* (3). The Judges concur in this that, on the negligence of a party to receive a document properly worded, an innocent purchaser shall not be made liable to pay the penalty of his negligence. The decision of Morgan, C. J., in *Martin v. Purnoram* (4) is not fortified by any authority. The only decision in point is *Bolakee Lal v. Chowdhry Bungsee Sing* (5). The wording of the instrument is obscure. It seems that any expression which would constitute a mortgage has been carefully avoided. A document, which is not on the face of it a mortgage, could not be interpreted as a mortgage. In the decision in *Shunkur Lall v. Poorrun Mull* (6) the terms of the deeds were fully understood and acted upon, the acts and conduct of the parties were looked to. But in this case there is nothing to show their intention. The equities between the parties are equal. The respondent is a *bonâ fide* purchaser without notice.

Baboo Annada Prasad Banerjee in reply.

The opinions of the learned Judges upon the question proposed to them were as follows :

Couch, C. J.—If the question in this case was simply

(1) 6 Sel. Rep., 165.

(2) S. D. A., 1855, 353.

(3) S. D., A., 1857, 825.

(4) 2 Agra H. C. Rep., 124.

(5) 7 W. R., 309.

(6) 2 Agra H. C. Rep., 150.

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whether a bond for payment of money, with a simple covenant not to alienate until payment, constitutes a mortgage, I should doubt whether it ought not to be answered in the negative ; but the question referred to us is whether the document of the 8th April 1858 is to be considered a mortgage of the lands comprised therein. No precise form is required for a mortgage, and I think it is sufficient if it appears to have been the intention of the parties to create a charge upon the lands, and in ascertaining the intention, " the form of expression, the literal " sense is not to be so much regarded as the real meaning which " the transaction discloses"—*Hunooman Pershad Panday v. Musamut Babooee Munraj Koonwaree* (1).

Now, upon the translation of the bond agreed upon by the pleaders, I might have had some doubt as to the intention of the parties, although I am inclined to think that the latter part of it, which declares that any instrument of alienation " shall be " " invalid and of no avail, and a transaction set up to avoid pay- " ment of the debt," shows an intention that the lands should be charged.

But the translation with which we have been furnished by the Court translator, makes the intention clearer. It is, " should we " make all these transactions with respect to the said lands, the " instrument relating thereto shall be deemed invalid and as " executed in favour of nominal parties for evading payment " (literally digesting) of the money covered by the said land." I think these words show that it was the intention of the parties that the lands mentioned should be a security for the debt. If so, that would create a charge. I am not prepared to say, as the late Sudder Court seems to have held in the case quoted, that if a party does not adopt one of the ordinary forms of mortgage, the transaction is invalid against a purchaser. If the intention can be collected from the instrument, the form of expression is not material. In my opinion, the question referred should be answered in the affirmative.

KEMP, J.—I am of the same opinion. The words in the bond sufficiently indicate the intention of the parties to pledge the

(1) 6 Moore's I. A., 410.

property. The whole of the bond was not translated for the Judges who referred the case to the Full Bench; the latter part of the bond was not properly submitted for their consideration. The whole bond having now been translated, the intention of the parties is rendered quite clear, and, as observed by the Chief Justice, no formal words are necessary to create a charge on the property if the intention of the parties is sufficiently expressed by the words used in the instrument. There is also a decision of the Agra High Court, by Morgan, C. J., and Roberts, J., of the 30th January 1867, *Martin v. Pursram* (1), which takes the same view.

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L. S. JACKSON, J.—I concur in the judgment delivered by the Chief Justice.

E. JACKSON J.—I am of the same opinion.

MARKBY, J.—This case was referred to the Full Bench by Mr. Justice Bayley and myself, because we thought the document which we were called upon to construe was a simple covenant not to alienate until payment of the money due under a bond of the same date, and we thought it desirable to ascertain whether such a document constitutes a mortgage. For the translation which was then agreed upon by the pleaders on both sides as the basis of our judgment, the Full Bench has substituted one made by an officer of the Court, upon which, I understand, our present judgment proceeds.

All the members of the Court, except myself, think that there are to be found in this new translation expressions which amount to more than a mere covenant not to alienate—expressions which indicate an intention to create a mortgage.

Of course if this is so, the general question upon which Mr. Justice Bayley and myself expected the decision of the Court to turn does not arise; but I own that I have had some difficulty in discovering, even in the new translation, the expressions which indicate an intention to create a mortgage apart from a covenant

(1) 2 Agra H. C. Rep., 124.

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not to alienate; and I should have still preferred that the decision of the Court should have turned upon the mere general question which we suggested. As, however, this will not be the case, I think it is sufficient for me to say, that I doubt whether the document before us is any thing more than a simple covenant not to alienate until payment of the bond.

[APPELLATE CRIMINAL.]

Before Mr. Justice Phear and Mr. Justice Mitter.

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IN THE MATTER OF THE PETITION OF SURENDRA NATH ROY AND OTHERS.*
 THE QUEEN v. SURENDRA NATH ROY AND OTHERS.

Magistrate—Arrest—Warrant—Complaint—Remand—Commitment—Bail—Criminal Procedure Code (Acts XXV of 1861 and VIII of 1869), ss. 68, 77.

Section 68 of the Criminal Procedure Code applies only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint. That section is intended for the purpose of enabling a Magistrate to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases the jurisdiction to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge must be either personal or derived from testimony legally given. The report of the Police, or any statement which falls short of an actual formal complaint, or of a statement made on oath, is not sufficient in law to give a Magistrate jurisdiction to issue his warrant.

Under section 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent Police officers, and unless the urgency is imminent.

The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate; and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence, there can be no grounds.

In this case, although the Magistrate had acted illegally before evidence was recorded, and had shown a want of discretion in some of the stages, the High Court refused to quash the Magistrate's order directing the prisoners to be put up on their defence, on the ground that the order had been made by a competent officer after hearing evidence which was judicially received and recorded.

Mr. Ghose (with him Baboos Mahendra Lal Shome and Grish Chandra Mookerjee), moved to make absolute a rule nisi, which

* Miscellaneous Criminal Case, No 6 of 1870, from Nuddea.

had been issued, on the 24th of January 1870, by PHEAR and E. JACKSON, J. J., on the petition of Surendra Nath Roy and others

The following order was made by the Court, while granting the rule *nisi*, on the 24th of January :

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PHEAR, J.—Let the record of this case be sent up without delay and let a rule *nisi* issue to the prosecutor Nabin Roy, to show cause, within fifteen days after the service upon him of the rule why the orders of the Magistrate of the 15th and 17th instant should not be quashed upon the grounds mentioned in the petition, or why the case should not be transferred to some other Magistrate for investigation, as prayed ; and, in the meantime, let all further proceedings before the Magistrate be stayed. A copy of the order and petition must be forwarded to the Magistrate with the intimation that, if he wishes it, he will be heard at the hearing of the rule, and that he may send to this Court any explanation of the matters of the petition which he thinks fit.

The following is the petition, with the material portions of the written explanation on it, submitted by Mr. Monro, the Magistrate :

PETITION.

RESPECTFULLY SHEWETH,

That your petitioners are defendants in the above-named case, at present pending in the Court of Mr. J. Monro, Officiating Magistrate of the Nuddea District.

1. That your petitioners have been informed that, on or about the 18th of August last, a petition was presented to the Joint-Magistrate of Nuddea, by one Gopal Roy, alleging that one Nabin Roy had been attacked, on August 14th, 1869, by some of the defendants in the above-named case, and others, at Kamalbat, in the district of Nuddea, and thence carried away by force ; and praying that steps might be taken for the release of the said Nabin Roy, who was then missing.

EXPLANATION BY THE MAGISTRATE.

Paragraphs 1 to 8 of the Petition.—

The facts are, on the whole, not incorrectly stated, although some modifications are necessary. The action taken by me was not based on any proceeding held before the Joint Magistrate, of the existence of which I was not aware till recently, when I went into camp. On the 14th of August, a complaint was made at the Nakasipara Station, by one Trailakhanath Roy, alleging that a dacoity had been committed in the Kamalbat Cutcherry, and his brother Nabin Roy carried off. Police investigation followed, and went on without any trace of the missing Nabin Roy for a long time.

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2. That the said Gopal Roy presented another petition on the 28th of August last, praying for an enquiry into the circumstances detailed in his former petition, but to the knowledge of your petitioners neither Gopal Roy, nor any one else was examined, either by the Magistrate or Joint-Magistrate of Nuddea, on the matter of the petition of the said Gopal Roy, before the 2nd of November last.

3. That, about the 24th of September last, Mr. J. Monro, the Officiating Magistrate of Nuddea, issued a warrant, directing one of your petitioners, Surendra Nath Roy, now one of the defendants in the above-named case to arrest and forward, to the said Officiating Magistrate, your petitioners, Mahesh Hari, Paika Hari, Harish Ghose, and Dwarik Ghose, some of the defendants named above.

4. That, in obedience to the said warrant, your petitioner, Surendra Nath Roy, arrested and made over your petitioners, Mahesh Hari, Paika Hari, and Harish Ghose, to Mr. Monro, at Muragacha, on or about the 27th of September last.

5. That Mr. Monro then directed your petitioners, Paika Hari, Mahesh Hari, and Harish Ghose to be sent to Hajut (jail) refusing a verbal application which was then made on behalf of your petitioners to have them released on bail.

6. That, on or about the 7th of October last, your petitioner, Surendra Nath Roy, in obedience to the warrant aforesaid, forwarded one of your petitioners, Dwarik Ghose, to Mr. Monro, who was then at Krishnaghur.

7. That another application was made to Mr. Monro at Krishnaghur, for the release, on bail, of one of your petitioners, Dwarik Ghose, as well as of your petitioners who were committed to custody at Muragacha as afore-

When I was in camp, in September, at Muragacha, the police reported to me, that although they had tried every means in their power they could not arrest any of the accused, Mahesh Hari, Dwarik Ghose, Paika Hari, Harish Ghose, &c., as they were concealing themselves.

The man Nabin was still missing, and upon the police report and the statement of the missing man's brother, who appeared before me at Muragacha, I issued an order to Surendra Nath Roy, whose ryots the accused were, forwarding a warrant for their arrest, and directing him to produce them as persons accused of dacoity, &c.

Three of the men were produced as stated, and were remanded to Hajut on the 22nd September, their production within fifteen days being ordered.

I am not aware that any application for their release on bail was then made. The fourth man, Dwarik Ghose, was produced on the 7th October, and on that day an application for the release on bail of the men previously remanded was made, and refused for reasons recorded.

Up to the 2nd November, the police had not been able to find any trace of the missing Nabin Roy, and until they did so find him, they sent up no evidence against the accused.

I was not aware of the petition made by Gopal Roy. I had before me the fact of the man Nabin Roy having been missing for some months, and of the accused being implicated in the crime of having made away with him. The case being of such a serious nature, I did not think myself justified in accepting bail.

The men were constantly brought up before me, and I remanded them formally as entered in the Magistrate's Hajut book. It would, undoubtedly,

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said, but this application was also rejected.*

8. That your petitioners, Mahesh Hari, Paika Hari, Harish Ghose, and Dwarik Ghose, were kept in *Hajut* until the 2nd of November last, i. e. the first three for about 34 days, and the fourth for about 26 days, merely on suspicion, and without any evidence being recorded against your petitioners in the presence of your petitioners.

9. That, on the 2nd of November last, your petitioners and other defendants were ordered to appear before Mr. Monro, at Krishnaghur, and on that day a portion of the deposition of the said Nabin Roy, who, it was alleged, had been missing, was taken by Mr. Monro.

10. On the same day, i. e., the 2nd of November, your petitioner, Surendra Nath Roy, of Bonadanga, was made a defendant, and was committed to custody, after only a portion of Nabin Roy's evidence, had been recorded. That an application for the release on bail of your petitioner, Surendra Nath Roy, was made on that day, but it was rejected by Mr. Monro, on the ground that a strong *prima facie* case had already been established against your petitioners, under section 365

have been more regular if the police had sent up evidence sooner. But as the whole case turned on the finding of Nabin Roy, and their whole exertions were directed to finding him out, their failure to send up witnesses is intelligible.

It would also have been more regular, if I had examined witnesses, but I did not know what witnesses from among those mentioned in the Police reports, the police intended to produce. As above stated, I did not think myself justified in letting the accused out on bail, until some tidings had been received of the missing man.

Paragraphs 9 to 14.—The facts are correctly stated, and I am not aware that any illegality is alleged to have been committed, or any bias shewn by me at this state of the proceedings. I declined to release the accused Surendra Nath on bail, as I considered the deposition of Nabin Roy afforded grounds for believing in the existence of a *prima facie* case against him under sections 365-8 of the Penal Code in addition to other charges.

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* The order passed by Mr. Monro on this petition was as follows:—"The four men, Dwarik Ghose, Paika Hari, Harish Ghose, and Mahesh Hari, have been arrested in a case, which is at present pending enquiry before the Police. The case is one of kidnapping and illegally confining a *Tehsildar*; the kidnapped man has not been found; there is no knowing what has become of him. It is quite possible that he has been murdered. I do not, therefore, feel justified in accepting bail for the accused, who may, at any time, find themselves on their trial for murder, until it is clearly shewn that Nabin is alive, and that they had nothing to do with his being abducted with the intention that he should be unlawfully confined (Section 368.) At present there seems sufficient grounds to implicate them in such an unattractive offence. Bail is, therefore, refused.

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and 368 of the Indian Penal Code, for offences which were not bailable.

11. That, on the 3rd of November, the application for bail on behalf of your petitioner, Surendra Nath Roy, was renewed, but Mr. Monro refused to re-consider the order he had made the day before.

12. That, on the 4th of November last, the evidence of the said Nabin Roy was concluded, and after the examination on the same day of three or four more witnesses, the hearing of the case was adjourned for about a week by Mr. Monro, who gave your petitioners to understand that the investigation into the case was then going on, and that it was quite uncertain what length of time that investigation might occupy.

13. That, on the order for adjournment, as aforesaid, being given, an application for the release of your petitioner, Surendra Nath Roy, on bail, was made, but it was rejected by Mr. Monro.

14. That, in the mean time, that is on the 4th November last, an application for bail on behalf of your petitioner, Surendra Nath Roy, was made to the Sessions Judge of Nuddes, but that officer having declined to interfere with the Officiating Magistrate's order at that stage of the proceedings, your petitioner, Surendra Nath Roy, applied to this Honourable Court, and was by this Court ordered to be released on bail.

15. That your petitioner, Surendra Nath Roy, has been informed that the said order of this Honourable Court reached Mr. Monro at about 3 p. m. of the 10th of November last, while he was in Court, but he went away to his house without ordering the release of your petitioner, Surendra Nath Roy, who was, consequently, not let out on bail until the next day. Your petitioner, Surendra Nath Roy,

Paragraph 15.—The statement is untrue, and is an attempt to insinuate that I have shown disrespect to the order of the High Court, which I would not do; and that I have tried to manifest a petty piece of spite towards the accused, which I am confident the High Court will consider me incapable of committing.

I received the order in Cutcherry at 3-45 p. m. I left Cutcherry at the

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has been further informed, that a mooktear on behalf of your petitioner, Surendra Nath Roy, went to Mr. Monro at his house, on the afternoon of the 10th of November, to remind him of the said order of this Honorable Court, but Mr. Monro declined to receive any application on the subject in his house.

16. That, on the 2nd of November last, after the first portion of the evidence of the said Nabin Roy was recorded, Mr. Monro directed that the witnesses who had then been sent by the Police, should be kept in custody in Mr. Monro's house. Among the witnesses so kept, was one Kristo Charal, who was made a defendant the next day, but who, on the 3rd day, sat with the witnesses, and not with the defendants, although afterwards he was treated as a prisoner.

17. That your petitioners have been informed that some of the witnesses for the prosecution were also ordered to be detained in the Magistrate's house, during the night of the 3rd of November last.

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usual time, and before I left Cutcherry I sent the order to the District Superintendent, who received my order at 4-10 P. M.

I am not aware that any Mooktears came to my house to remind me of the order; if they did, it is not improbable that my Chaprasis refused them admittance, as I do not do Cutcherry work at my house. Admitting that they did come, I had already issued orders and needed no reminder.

It would have been such a contemptible abuse of power to detain a man ordered to be released; a few hours in prison, that I can only express my indignant repudiation of the possibility of any such conduct on my part. The only reason why Surendra Nath Roy was not released on that day was, so far as I know, the non-production of sureties. As soon as they appeared, his release was immediately ordered, and his release would have been ordered sooner had they arrived sooner.

Paragraphs 16, 17.—The facts are correct to a certain extent. A long with Nabin Roy were sent in certain persons. As above stated, I was willing to go on with the case on the first night, to which the defendant's counsel objected. In the interest of both parties, it was of the highest importance that the witnesses should be subjected to no undue influence of both parties. I therefore, ordered them to be kept in a Bungalow beside my house, recording the fact, vide Order of 2nd November.

That, in so doing, I acted with impartiality and with no disfavor to the accused may be inferred from the fact that the vakeels of the accused requested me to keep the witnesses during the night of the 3rd in the same place, and to allow no access to them, which I did. The witnesses cheerfully consented to stay.

It is needless to say that, as I pre-

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18. That the case was again taken up by Mr. Monro, at Krishnaghur, about the 9th of November last, when, about seven witnesses for the prosecution were examined, and that one of those witnesses stated, in cross-examination, that he had previously told Mr. Monro in private, what he had deposed that day.

19. That the case was then adjourned to the 18th of November, but no witnesses were examined on that day, and it was again adjourned to the 25th of November, on which day also the case was not taken up, but the defendants were ordered to appear at Banaghat, on the 9th of December last.

20. That, on the 9th of December, the defendants appeared at Banaghat but were told on the 10th to appear again on the 23rd December, at Kanchrapara. (a distance of about 40 miles from Krishnaghur) where Mr. Monro was expected to be on that day, during his cold weather tour.

21. That, on the 22nd of December, the defendants having learned, that Mr. Monro was then at Chakda, appeared before him there, on the 22nd and 23rd, but the case was taken up on the 24th, when about six witnesses for the prosecution were examined.

22. That the case was next taken up on the 3rd January last, at Kanchrapara, when about five more witnesses were examined.

23. That, on the next day, some more witnesses were examined, and

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vented others from communicating with the witnesses, I held no communication with them myself.

Kristo Charal was with them. I knew nothing against him one way or another. He remained with them till their depositions were recorded, and on my discovering who he was he was treated as a prisoner.

Paragraph 18.—The private communication made to me by the witness, referred to was this: The Inspector brought before me one evening three men, who he said were witnesses. The district Superintendent was then, I believe, absent. I asked the men who, on seeing me began to clamour for Koraki, where they had come from, and they said from Gobindpore in Moorshedabad; that Nabin Roy had been brought to their house; that Tarak Roy had brought him.

On hearing this I told the Inspector to take them away, and produce them next day for regular examination in Court. The men were, accordingly produced. I leave it to the Court to judge whether I sought to receive private information; whether I did not see the men casually; whether on casual mention of their having a statement to make bearing on the case, I directed their production and open examination, and whether I was in any way unfavorably to the accused influenced by any thing said to me by witnesses on whose testimony no charge has been framed. The Inspector came to me as head of the Police to know what to do with the men.

In heavy cases, which the Magistrate of the District is expected and ordered to take up himself in Court, he cannot help being cognizant of the action of the Police. In the present instance, such was the case as regards the witnesses referred to, but that such cognizance, under the circum

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the defendants were then ordered to appear before Mr. Monro on the 15th of January, at the village of Sharsha, a distance of about 50 miles from Krishnaghur, and about 28 miles from the nearest Railway Station a Chakda.

24. That, in the meantime, and after the examination of the principal witness, Nabin Roy, and some other witnesses, had been concluded, about ten persons were arrested, and made defendants in the case, but those witnesses who had been examined previously were not recalled.

25. That the Magistrate, Mr. Monro, having refused to let out on bail some of the defendants arrested after the examination of Nabin Roy, although a petition was presented on behalf of these defendants, pointing out the impropriety of making them defendants at that stage of the proceedings, an application was made on their behalf to the present Officiating Sessions Judge, who directed them, on the 22nd November, to be enlarged on bail.

26. That defendants, Kristo Charal, Matabbar Sheik, and Ujjalla, were kept in the Kotwali Thanna, for several days, while the rest remained in jail, before they were let out on bail.

27. That although your petitioner, Surendra Nath Roy, was let out on bail, by this Hon'ble Court, he was ordered by Mr. Monro not to go to his own house, but to show himself daily to the Court Inspector.

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stances unavoidable, operated in any way unfavorably to the accused, I emphatically deny.

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Paragraph 26.—It is true that the three accused were kept in the Than-na. I am not aware that there was any illegality in their being kept there. The prosecution having represented that the three prisoners had confessed, and that, after their confession being recorded, it was advisable to keep them apart from the other accused, I granted the request, and ordered them to be kept separate.

Paragraph 27.—I ordered the accused Surendra Nath and others to remain in Krishnaghur.

It was uncertain whether witnesses might not, on any day in addition to the fixed days, be produced by the Police (as actually happened.)

The case was being conducted at a great distance from Krishnaghur by the Police, and it was quite possible

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28. That the case was again taken up at Bongong, on Saturday the 15th of January, when one more new witness was examined on behalf of the prosecution, and the case for the prosecution was then closed.

29. That Mr. Monro then directed defendants, Kaias Sircar, Rakhal Roy, Braja Bhattacharji, Baboo Sheikh, Huboo Ghose, and Ujjath Bawa, to be discharged; and framed two charges, under sections 342 and 109 of the Indian Penal Code, against your petitioner, Surendra Nath Roy, and directed him to be put upon his defence, as Mr. Monro did not intend to commit any of the prisoners to the Sessions.

30. That the case was then fixed for the 27th instant, at Bongong, and Mr. Monro then said that he would draw up charges against the other prisoners on Monday the 17th.

31. That, on Monday the 17th, Mr. Monro framed certain charges (copies of which your petitioners have not received) against five other defendants, and directed the discharge of two defendants.

32. That, on Tuesday the 18th, Mr. Monro sent for one of the witnesses, cited by one of your petitioners, Hariah Ghose, and examined him, declining to receive a written petition which your petitioner Hariah Ghose presented, praying that the examination of the said witness might be

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that witnesses might be produced on other than the fixed days. To allow of such witnesses being speedily examined in presence of the accused, the restriction was imposed. On occasion shewn, I was quite ready to withdraw it, as may be inferred from the fact that when the accused Surendra Nath Roy asked to be allowed to go to his home for some religious ceremony, I granted the request at once.

Paragraphs 28, 29, 30.—The facts are correct. I may add that no charge was drawn up against the other prisoners, simply because there was no time. I worked all day at the case, in order that the counsel for the accused might get away, as he expressed a wish to do so; and as after drawing up the charge against Surendra Nath Roy, the said counsel, on my asking him, declared that the delaying to draw up the charges against the other accused did not matter. I postponed the case at a late hour to the 17th, the 18th being Sunday. The counsel for the accused publicly acknowledged his obligation to me for working so late to allow of his departure.

Paragraphs 31 and 32.—On the 17th, after drawing up the charge against Hariah Ghose, and hearing his reply, I noticed that one of his witnesses was a semindar, whom I knew to be in the neighbourhood. I considered that it would be advisable to secure the attendance of that witness, while he was in the neighbourhood, knowing that he was not residing there, and thinking it not improbable that there might be some difficulty in serving a summons on him afterwards. I consequently explained this to Hariah Ghose and his

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postponed. The said witness was not examined in the presence of any of the other defendants or their counsel.

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mooktear, and ordered a summons to be issued for the appearance. On the following day, and on the 18th, the deposition of the zemindar was recorded in the presence of Harish Ghose and his mooktear, by whom the witness was cross-examined.

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The statement that I declined to receive a petition asking for the postponement of the examination of this witness, is untrue. No such petition was presented, and no such petition was refused. Had such an application been made, I would have considered it as I considered an application of the vakeels of the accused on a previous occasion at Chakda, when they requested certain witnesses, namely, Ainuddin and others, to be recalled, and I granted the request as fair and reasonable. There was no reason why I should have acted differently on the present occasion, and I declare the statement to be untrue.

The witness was not examined in the presence of any of the accused, except Harish Ghose, because none but Harish Ghose had called him.

33. That while your petitioner, Surendra Nath Roy's case is fixed for the 27th instant, other defendants are directed to produce their witnesses on the 26th.

34. That the Officiating Magistrate, Mr. Monro, had all along given the defendants to understand that he would commit the case to the Sessions.

35. That your petitioners have cited about forty witnesses who will have to be brought from long distances, some from the district of Moorshebad where Nabin Roy alleges he was confined.

36. That, in addition to the physical discomfort of following the Magistrate from place to place, and having to stay in villages where there is no suitable accommodation, your petitioners have already incurred considerable

Paragraph 33.—This is correct. I purposely selected the 26th, knowing that the 27th had been fixed for the hearing of the witnesses of Surendra Nath, and I did so for this reason. I was aware that Surendra Nath Roy had summoned a large number of witnesses, whose examination would probably take more than one day. If to these witnesses were to be added the witnesses summoned by the remaining accused, there was a probability of the counsel of the accused being detained three days at Bongong. As the counsel had expressed a wish to have the case disposed of, if possible, without further delay, I thought I might consult his convenience, by having the witnesses for some of the defendants heard on the 25th, reserving them for further examination by the

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expense in having had to take their counsel and agents along with them. 37. That your petitioners have been much harassed by the repeated adjournments, as detailed above, and as Mr. Monro has declined to take up the case at Krishnaghur, your petitioners will find very great difficulty in producing their witnesses at Bongong, or any other place in the interior of the Nudda district.

counsel on the 27th, when he arrived. I regret to find that my good intentions towards the counsel have been distorted into a manifestation of unfairness to his clients. I can only say that such were my intentions as above described, as would have been shown had the witnesses appeared on the 25th, or the counsel on the 27th.

I regret the necessity for the repeated adjournments, not one of which has been without cause. I regret the necessity of taking up the case while on tour, and to reduce the inconvenience to all parties to a minimum. I have, as above stated, kept my camp close to the rail, or in places easy of access. I have, in short, done every thing I could to facilitate the appearance of counsel and the accused.

I had intended making over the case to the Joint-Magistrate when I went on tour, but found I could not do so under section 68. I declined to take up the case at Krishnaghur, while at Sarra, as I could not make arrangements consistently with my other duties to be present at Krishnaghur, and, as a matter of fact it is quite as easy for counsel to appear at Bongong as at Krishnaghur, the journey in the former case consisting of 34 miles by rail, and 20 on horseback; in the latter of above 50 by rail and 12 by horse ghari.

40. That there was further pending, in the Court of Mr. Monro, a complaint proffered by the Police against one of your petitioners, Surendra Nath Roy and another, for having, as alleged, obstructed the Police in their investigation into the case of Nabin Roy, and for having caused disappearance of evidence; that your petitioner, Surendra Nath Roy, was arrested in the first instance under a warrant in September last.

41 That the enquiry into the

Paragraphs 40 and 41.—The fact of the other case being instituted is correct. The fact of the last witness having been examined about the beginning of October, is also correct. The statement that no postponement was necessary, is not correct. The case remained pending at the beginning of October, at the request of the prosecution. I took it up immediately after the opening of the Court, and decided, I imagined, with the consent of the vakeels, to finish it in connection with

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case was commenced by Mr. Monro in September last, and that the last witness was examined about the beginning of October, and although no postponement was necessary, he left the case undecided until last week, when, as your petitioner, Surendra Nath Roy, was informed yesterday, the case was decided in his favor.

42. That Mr. Monro having promised to the defendant's counsel to grant them copies of the proceedings, and evidence in the case, your petitioners sent, at much expense, two copyists to Bongong to get copies of the proceedings, but your petitioner, Surendra Nath Roy, has just been informed that Mr. Monro, after having insisted on learning the reason for which your petitioners wanted to have copies, and after having taken the deposition of one of the said copyists on that point, has refused to give your petitioners copies of Mr. Monro's proceedings in the case.

43. That your petitioners submit, that Mr. Monro, having expressed from the beginning his opinion that a strong *prima facie* case had been established against your petitioners, and also that he would commit the case to the Sessions,* he is not competent to try your petitioners himself; nor is he, on account of the bias he has all along displayed on behalf of the prosecution, as evident from the circumstances detailed above, and from his being influenced by private information, a proper person to be entrusted with the trial of your petitioners.

That your petitioners, therefore, pray, *firstly*, that taking into consideration the grounds set forth above, your Lordships will be pleased to send for the record in the case mentioned

and at the same time as the original case of Nabin Roy. I recorded an order to this effect, and the case remained pending in consequence. As soon as the case for the prosecution in Nabin Roy's case closed, I took up the second case and disposed of it.

The evidence for the prosecution in the second case, as regards the charge under section 201, being really the same as that for the prosecution in Nabin Roy's case, and that evidence being insufficient to frame a charge under section 201 against Krishna Nath Roy, I discharged him immediately on the case for the prosecution being closed.

I acted in the above case, so far as I am aware, legally and properly.

* On the 4th November, Mr. Monro recorded the following as his opinion:—
"The statement of Nabin Roy, if true, does raise a strong presumption of the guilt of the accused, and would, if the question of committal were at the present stage of the proceedings raised, require the committal of the accused."

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above, and quash the order of Mr. Monro dated the 15th and 17th instant, whereby he directed your petitioners to be put upon their defence before him.

2ndly.—That should there be, in the opinion of your Lordships any evidence against your petitioners, they may be tried by the Magistrate of Moorshedabad, in which district many of the witnesses for the prosecution, as well as for the defence, reside, or by the Joint-Magistrate of Nuddea, at Krishnaghur, or by any other Court that your Lordships may think proper.

Mr. Paul (with him Baboo *Ambika Charan Banerjee*), for the prosecutor, now showed cause :—I rely on the explanation of Mr. Monro, which is quite satisfactory, and absolves him from any bias or improper feeling. Section 68 of the Criminal Procedure Code (1) gives the Magistrate jurisdiction to proceed under the circumstances of this case. Mr. Monro acted in good faith throughout. It would be a bad precedent if this rule were made absolute.

Baboo *Anukul Chandra Mookerjee* did not wish to address the Court on behalf of the Crown.

Mr. Monro said that, in doing what he had done in this case, he had simply followed the practice which prevailed in the Mofussil, and that all his acts were done in good faith. He also added that, being about to leave the country, he would not take up the case himself, whatever might be the result of the rule, and that he had no desire to try the petitioners himself. He would, however, ask the Court to acquit him of the imputations made in the petition against his character as a judicial officer.

(1) Act XXV of 1861, s. 68.—“ Ex-cept as is otherwise provided in Chapter XI of this Act, the Magistrate of the district or a Magistrate in charge of a division of a district, may, without any complaint, take cognizance of any offence which may come to his knowledge, and may issue a summons, or in cases where a warrant may issue, a warrant of arrest against the person known or suspected to have committed such offence, in the same manner as if a complaint had been made against such person.”

Mr *Ghose* in support of the rule.—It is evident from Mr. *Monro's* own explanation that he had prejudged the case. All the important allegations in the petition are admitted. The reasons given by Mr *Monro* for refusing bail on the 7th October, show that, before taking any evidence whatever in support of the prosecution, he wanted the defendants to establish their innocence. The warrant issued by him before any evidence was taken, specified a bailable offence, and yet bail was refused. To refuse bail when a person ought to be bailed is a misdemeanour—*Oshorne v Gough* (1). A Magistrate cannot issue a warrant without evidence, nor can he commit a person to *Hajut* before evidence is recorded against him—*In the matter of Mahesh Chandra Banerjee* (2). In this case the Magistrate acted upon hearsay information communicated to him privately. Section 68, Criminal Procedure Code, does not give the Magistrate jurisdiction in such a case. The word “knowledge” in that section must be held to be either judicial or personal knowledge.—*In the matter of Mahesh Chandra Banerjee* (2). Section 68 only applies to cases where no complainants come forward. All the proceedings ought to be set aside as being based upon an illegal foundation. [MITTEE, J.—Do you contend that the subsequent proceedings ought to be quashed on account of prior illegalities ?] Yes ; they vitiate the whole proceedings—*The Queen v Mahima Chandra Chuckerbutty* (3) ; and they are evidence of bias on the part of the Magistrate. He received information on the subject of the case privately, and conferred with the witnesses in the absence of the accused ; this disqualifies him from trying the prisoners. A Judge or a Magistrate is not competent to take upon himself to say as Mr *Monro* does that such private information had no influence on his mind—*Dobson v Groves* (4). The commitments were void *ab initio* being illegal, and for an indefinite and unreasonable period—*Davis v. Capper* (5) ; and *Res v Gooding* cited in *Burn's Justices of the Peace* (6). A Magistrate does not

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(1) 3 B & P., 550

(4) 6 Q. B., 637

(2) 4 B L R., App. 1

(5) 10 B & C 28

(3) 3 B L R A Cr. 67

(6) 24th Edition Vol. 1, 1001, note

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act in good faith, who does not act carefully, circumspectly, and with due diligence—*Vithoba Malhari v Corfield* (1) No remand without a hearing can last for more than a fortnight—*Reg v Surkia* (2). In this case the adjournments were for an unreasonable time and without any reasonable cause. Under Chapter XII of the Criminal Procedure Code, the Magistrate could not direct a police investigation into the case, after it had been taken up by him, but he might have done so before issuing process, (Section 180). The order to Surendra Nath Roy to show himself daily to the Court Inspector was wholly void, and showed improper feeling on the part of the Magistrate, and the reason assigned by Mr Monro for that order *viz* the convenience of the witnesses who might be forwarded by the police at any time—could not be regarded as satisfactory, when the same order was repeated by him at Bongong, after the charges had been framed on the close of the prosecution. The order which Mr Monro gave to detain three defendants in the Thanna, while the others were in jail, was wholly illegal, for, under section 222, a warrant of commitment could be directed only to the jailor or some person having authority. This order being to induce the prisoners to confess, was wholly illegal and improper. Mr Monro acted improperly and illegally by sending for one of Harish Ghose's witnesses and examining him himself in the absence of the other defendants. Not one of the witnesses for the prosecution was summoned, but all were arrested and brought by the police, contrary to the provisions of the Code of Criminal Procedure. The whole conduct of Mr Monro shows clearly that he is not a fit person to try the petitioners himself.

PHEAR, J.—It seems to me clear from Mr Monro's own explanation of the course of this case, that he has committed in it serious deviations from the procedure laid down by the Criminal Procedure Code, and that he has, in some of the stages of the case, shown a want of discretion, which is to be lamented; but, on the whole, I think that the rule ought to be discharged, because I entirely acquit Mr Monro of having, in any

(1) 3 Bom H C App., 1

(2) 5 Bom H C Cr. 31

part of this protracted inquiry, been actuated by any improper feeling towards the prisoners, or by any other desire than that of doing his duty as a judicial officer.

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It is very much to be deplored that the practice which Mr. Monro has taken to be accordant with the provisions of the Criminal Procedure Code, should at this day obtain, as we are told it does, in a zilla so close to the capital as Nuddea.

It cannot be questioned, I think, that the custody of the prisoners was, from the time of the first arrest up to the 2nd of November, illegal. Mr. Monro says he supposed that the step he took in causing their arrest was sanctioned by section 68 Criminal Procedure Code, but I am very distinctly of opinion that that section applies only to cases in which the private individual, who is injured or aggrieved, or some one on his part does not come forward to make a formal complaint. It is a provision of the law for enabling a public official to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases, the jurisdiction of the Magistrate to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge, I apprehend, must be either personal or derived from testimony legally given.

But here Mr. Monro commences his explanation by stating not only that the brother of Nabin Roy had made a complaint in the first place to the Joint-Magistrate, but that Mr. Monro's own subsequent proceedings were in effect instituted upon information given by this man to the police and to himself. That being so, the case obviously might, and ought to have been conducted upon one or other of the bases afforded by section 66 and by section 135. There was no occasion whatever for Mr. Monro to take upon himself the character of a public prosecutor.

There is in my judgment, no doubt that the law is just as jealous of personal liberty in India as it is in England, and that liberty cannot rightly be taken away except under circumstances which are clearly prescribed by positive law. Now the warrant of arrest which Mr. Monro issued, and under which the petition-

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ers were taken into custody, was grounded upon the information informally given by the brother of the missing man. "The mau Nabin was still missing, and upon the police report and the statement of the missing man's brother, who appeared before me at Muragacha, I issued an order to Surendra Nath Roy, whose ryots the accused were, forwarding a warrant for their arrest, and directing him to produce them as persons accused of dacoity." This is Mr. Monro's own statement.

As at present advised, I don't think that the report of the police, or any statement of the missing man's brother, which falls short of an actual formal complaint, or of a statement made on oath is sufficient in law to give the Magistrate jurisdiction to issue his warrant. I need not point out the mischief that would be likely to ensue if a Magistrate were justified on the mere report of the police in arresting any person whom they wished to incriminate. In a particular case, namely when an offence is committed in his presence, a Magistrate may, no doubt, without complaint or sworn testimony, order the arrest of the offender; but this is by virtue of section 110 and the separate specification of this power in the Code goes far to show that section 68 does not bear the construction which Mr. Monro has put upon it. The cases in which the police may arrest without a warrant, are prescribed with minuteness in the Criminal Procedure Code, and it appears to me that the more extensive power conveyed by a warrant must proceed from the exercise of a judicial discretion, either on the Magistrate's own view, or upon materials furnished by some other person, under such circumstances as will render the person responsible for putting the law in motion, i. e., furnished by him either in the capacity of prosecutor or by statement on oath.

Again, the address of the warrant in this case is unfortunate. It is directed not to any police officer, but to Surendra Nath Roy, the person at whose instigation, according to the theory of the police, the alleged kidnapping originated, and even if the Magistrate did not take the police view on this point, Surendra Nath was clearly a person so closely connected with the parties who were supposed to be implicated, that he was soon arrested as an accomplice. Doubtless, section 77 of the Criminal Procedure

• Code (1) and the corresponding section of the amended Act (2) do give the Magistrate power to issue a warrant to an unofficial person. But in the enactment itself is to be found an indication of the circumstances under which the Legislature intended that power to be exercised, namely, when the Magistrate is without the assistance and services of competent persons charged with ordinary police duties, and responsible by virtue of their offices for the proper execution of a process of this sort; and above all when the urgency is imminent.

But whether or not the first arrest was made without legal foundation, unquestionably the subsequent commitment to *hajut* and the remands based, as these were, on no evidence whatever, were entirely invalid. The force of the warrant of arrest is at an end when the prisoner is brought before the Magistrate. The Magistrate cannot lawfully commit to prison, or remand a prisoner who is before him, without sufficient grounds, and in the complete absence of evidence there can be no grounds.

I regret, as I have already mentioned, during the hearing of the case, that Mr. Monro, on receiving the order of the High Court with regard to releasing the prisoner on bail, which order reached him while he was presiding in Court, did not at once make it public; even if it be supposed, as suggested by Mr. Paul, that none of the parties concerned were present in the Magistrate's Court at the time. I say I regret it, because publicity in these cases is the highest safeguard which the Magistrate has for preventing any misconception as to his motives and conduct.

After the 2nd of November, the case changed. At that time evidence was produced before the Magistrate, on which he could rightly, in the exercise of his judicial discretion, hold that the persons charged ought to be committed to prison, either to await

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(1) Act XXV of 1861, s. 77.—“A warrant shall ordinarily be directed to a Police Officer, but the Magistrate issuing a warrant may, if immediate service be necessary, and no Police Officer immediately available, direct the warrant to any other person.”

(2) Act VIII of 1869, s. 77.—“A warrant shall ordinarily be directed to a Police Officer, but the Magistrate issuing a warrant may, if he see fit, direct it to any other person.”

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trial, or for safe custody, during the adjournment of the inquiry. And it is because I think that this is the case, that I feel the strongest ground taken up by the petitioners fails them. For I am not prepared to say that because the arrest and custody previous to the 2nd of November was, in my opinion, illegal, therefore all the subsequent proceedings are void and ought to be quashed. It appears to me that the petitioners now stand committed for trial, under orders of a competent officer made after hearing evidence, which was judicially received and recorded. I cannot, therefore, say that they ought not to be tried on the charge on which he has so committed them.

There are other matters which have been referred to in the argument before us, and which have, I don't say unnecessarily, occupied a considerable time in discussion ; but I don't think that we are required to direct our attention to them in detail now.

It does seem to me, however, that a very unduly lengthened period did elapse in this case between the first apprehension of the prisoners and their commitment for trial, and I am disposed to think that an officer in Mr. Monro's position would have exercised the better discretion of he had taken care not to drag the parties stage after stage, as he did, following him in his tour through the Mofussil. It was surely open to him in more ways than one to have provided that the case should have been heard, and decided promptly at Krishnaghur. Even if he had been right, as I think he is not, in the supposition that the proceeding was one based on section 68, and that the case could not therefore be made over to any Subordinate Magistrate for investigation, still there was no sort of obstruction in his way to prevent him from taking it up himself, at the principal town, or at any other convenient spot in the district, and completely disposing of it in the same place. The movements of a Magistrate during his cold weather tour are not so strictly prescribed by an inexorable rule of necessity, that Mr. Monro could not have reasonably managed, in this case, to take all the evidence at one station.

The detention of the prisoners in the thanna was certainly, under the circumstances of the case, to say the least of it, not

judicious ; and the direction to Surendra Nath, while he was out on bail, to remain in Krishnaghur, was absolutely without authority, and should not have been made.

I also cannot think that the examination of Harish Ghose's witness was conducted in such a way, and under such circumstances, as to give complete confidence to the minds of the petitioners in the Magistrate's fairness and impartiality, with reference to the investigation.

And, on the whole, I cannot avoid the conclusion, after a full consideration of the facts of this case, that although there is nothing new imputable to Mr. Monro such as to disqualify him from trying the case between the Crown and the prisoners, there was still very much before the explanation which he has submitted to this Court was made public to render the prisoners justly apprehensive that they would not receive an unbiassed and impartial trial at his hands. Therefore, although I have said that I think the rule ought to be discharged, I also think, under the circumstances, that it should be discharged without costs.

MITTIEB, J.—I am of the same opinion.

Rule discharged.

[PRIVY COUNCIL.*]

BHYA RAM SING AND BHYA JUBRAJ (DEFENDANTS) v. AGAR SING AND OTHERS (PLAINTIFFS.)

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June 28.

ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT,
NORTH-WESTERN PROVINCES.

Hindu Law— Succession of Gentiles according to Mitakshara.

According to the Mitakshara, the great-great-great grandson of the great-great-great grandfather of the deceased is entitled to succession as one of the gentiles.

See also
15 B.L.R. 190

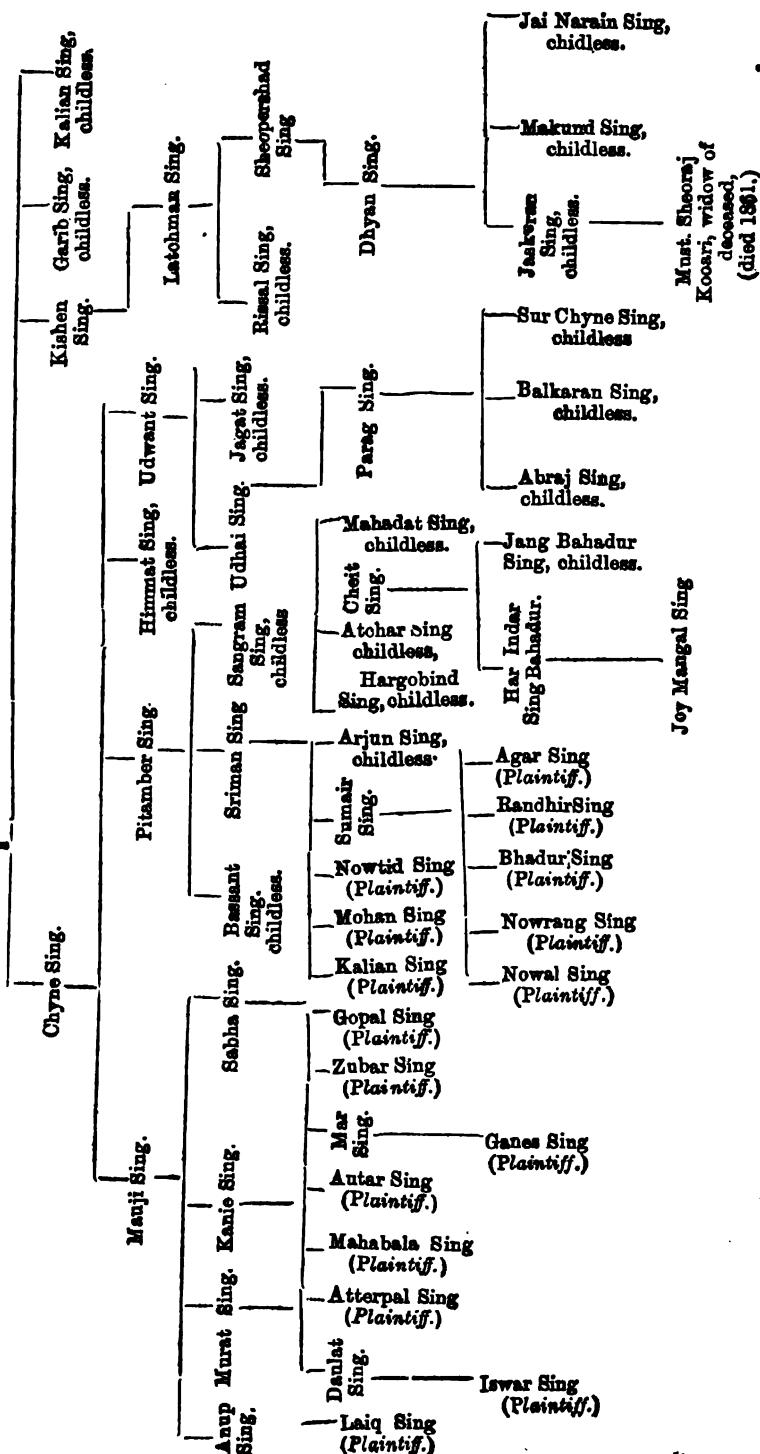
The facts in this case are unintelligible without reference to the following pedigree, the correctness of which was not disputed in the Courts below.

* *Present* :—THE RIGHT HON. SIR JAMES COLVILLE, SIR R. PHILLIMORE, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEELE.

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CHATTER PATI SING



Jaskaran Sing died childless, leaving a widow, Sheeraj Kooari, and having no blood relations save those descended from Chyne Sing, and leaving landed property.

Some of those descendants sued the widow for possession of the property, on the ground that it was joint ancestral real estate, and that the family was joint; but failed on the ground that it was the deceased's separate estate.

The widow died in 1861, and the nearest male cousins of Jaskaran, at her death, were all the respondents (plaintiffs) except the first seven: of these seven the fathers were then alive, so that although from the pedigree it appears that the respondents were in different degrees of remoteness, the first seven only represented those who claimed a vested interest at Jaskaran's death.

The appellants were strangers, who claimed under an alleged disposal to them, by the widow, of the property. The suit was brought by the respondents to eject the appellants. The defences were: first, that the widow's possession was for more than twelve years after Jaskaran's death, and that the claim made to the property during her life having been rejected, her possession was an adverse possession; second, that on the widow's death, Joy Mangul Sing had instituted a suit for the property, but that the Judge, on 15th October 1863, had decided in favor of the gift by the widow to the appellants (to this it was answered, that Joy Mangal Sing had no title, being more remote than the respondents); and third, that the respondents had no title to inherit by Hindu law. The Principal Sudder Ameen held that all the defences were good, and dismissed the suit.

The Sudder Court to which the plaintiff appealed (Messrs. Ross and Pearson) decided that the respondents were heirs according to Hindu law, and from this decision the present appeal was made. Their judgment was as follows:—"It is contended here, that the plaintiffs, none of whom are grandsons of any ascendant from the common ancestor, are not among *sapindas*, and not entitled to inherit. This is, however, opposed to the doctrine sanctioned by the author of the Mitakshara, Chapter II, section 5. 'The relation of the *sapindas*, or kindred, connected by the funeral oblation, ceases with the seventh person, and that of the *samanodakas*, or those connected

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“by a common libation of water, extends to the fourteenth degree.”

“We find direct authority for disregarding the construction proposed to be put by the respondents on the word *sapinda*. In a note on section 6, paragraph 27 of the *Dattaka Mimansa*, is given the construction of the author of the *Mitakshara*, on the text of *Yajnavalkya*, ‘beyond the fifth and seventh degrees on the mother’s side and the father’s side respectively, the relation of *sapinda* ceases,’ as follows :—‘On the mother’s side, that is in the line of the mother, after the fifth degree ; on the father’s side, that is, in the line of the father, after the seventh degree, the relation of *sapinda* ceases : as is understood.’ ‘accordingly, there are six *sapindas* in ascent, the father and the rest ; and six in descent, the son and the rest ; and the man himself is the seventh. Should the line diverge, the enumeration should be made until the seventh degree, commencing from whence the direction of the line varies. This is applicable to every case’ (1).

“We have thus furnished to us a rule for computing the order of succession in regard not only to *sapindas*, but to *samanodakas*. ‘The enumeration should be made until the seventh (or until the fourteenth) degree, commencing from whence the line varies.’ So much so, that we find that, in *Rany Srimutty Debeah v. Rany Koond Luta* (2), decided by the Privy Council, the Pundits gave it as their opinion that, according to the *Mitakshara*, the descendant in the eighth remove, reckoning from and inclusive of the common ancestor, was entitled as *sagotra* to take the property in suit. The decision went against the descendant, as his family, though formerly governed by Mithila law, had adopted the Bengal law, and because by Bengal law *bandhus* took the precedence of *sagotras*. No doubt was in that case expressed as to the correctness of the opinion of the Pundits, but, as noticed in the case of *Shoodhyan Sing v. Mohun Pandey* (3), had the claim been decided according to the *Mitakshara*, the *sagotra* would have had his title to inherit allowed.

(1) Sutherland’s Translation, p. 79.

(3) 20th July 1868, 2 S. D. A., N.

(2) 4 Moore’s I. A., 292-303.

W. P., 134.

v. Now some, at least, of the plaintiffs, as Laiq Sing and others (1) are within the *sapindas*, and are, of course, entitled to the property, where no nearer relatives to Jaskaran are forthcoming.

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We would advert to the case of *Rutcheputti Dutt Jha v. Ragundernarrain Rue* (2), in which was discussed the doctrine of the Mitakshara relating to the succession of certain claimants who were lineally descended from Samru Chowdry (we quote from the Report of the case in Mr. McNaghten's Reports Volume II, page 12), the paternal great grandfather of the great grandshire of Raja Inder Narain. It was ruled by the Sudder Court that, according to Mithila authorities, 'the estate of a person on failure of heirs, within the relation of brother's son devolves on the paternal kindred, who are *sapindas*, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person; in default of the *sapindas* on the *samanodakas* or those connected by a common libation of water, viz., the more distant paternal kindred, extending to the fourteenth degree; and in failure of *samanodakas* to those termed *bandhus*, or cognates. The rule of inheritance thus compendiously stated appears, from the full report in Moore's Indian Appeals to have been disputed, and it was argued before the Sudder Court that the Mitakshara did not support the pretensions of the descendants of Samru Chowdry in the sixth remove.

But the Judge, Mr. T. H. Harrington, whose decision, concurred in by his colleagues, was affirmed by her Majesty's Privy Council, rejected that argument. After stating that the term *putra*, or son, in the Mitakshara, and its commentary, the *Subhadini*, is frequently used as a general term for male issue or descendants, he goes on to observe (4):—

"To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grandfather, and every other ancestor, and would render nugatory the provisions in the Mitakshara as well as in the other books of law, which expressly state—'The succession

(1) The Court did not observe that those farther off in descent represented interests vested at the death of the widow. (2) 2 Moore's I. A., 132. (3) 2 Sel. Rep., 12. (4) 2 Moore's I. A., 132, 157, 158.

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' of kindred belonging to the same family, and connected by funeral oblations to the seventh degree; or if there be none such, the succession devolves on kindred connected by libations of water and they must be understood to reach seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend" (1).

" Now the doctrine thus overruled by the Sudder Court in 1812, is precisely that contended for in this case, on the part of the respondents; and so that doctrine was overruled in favour of the defendants in the fourth and fifth removes from the common ancestor,—the plaintiffs in this case.

" We do not consider the decision of the Judge of the 15th October 1863 to be any bar to the claim of the plaintiffs here as those nearest of kin were not parties to that suit. We should not have gone into the question of inheritance at such length, had we not seen instances of the lower Court's tenaciously adhering to the erroneous doctrine in *Sibhoo Singh's case* (which has not been reprinted among the Selected Reports published in 1861, two volumes) notwithstanding the several decisions of this Court to the contrary (2).

" It is true that that decision has not been overruled by a Full Bench, but it has been disregarded in decisions to which each individual Judge has, in a bench of two Judges, been a party, and the former rule has been adopted in lieu of that laid down in *Sibhoo Singh's case*.

We determine, therefore, that the plaintiffs have a title to inherit under the Hindulaw current in these provinces, and we annul the decision of the Principal Sudder Ameen."

Sir R. Palmer, Q. C. and Mr. Leith for the appellants.—The respondents are not *sapindas*, and even if Chatter Patti could be classed as one of the remoter *sapindas*, the descent as traced from him could not extend more than three generations down. The case of *Butsheputty Watt Jha v. Rajendernarain*

(1) Mitakshara, Chap. II, s. 5, paras. 5-6. 1863; Shoodhyan Sing v. Mohun Pandey,

(2) Koor Gohab. Singh v. Rao Kurrum 20th July 1863; Shunker Loll v. Bagram Singh, S. D. A., N. W. P., 22nd June 1864, 19th December 1864.

Rae (1) will not apply, being founded on the Mithila law. There is an omission in the pedigree in not showing that there were not *bandhus*, or cognates—*Rany Srimuty Debeah v. Rany Kheond Luta* (2) Elberling on Inheritance (8).

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Mr. *Field*, Q. C., and Mr. *Bell* for the respondents.—The respondents are either *sapindas* or *samanodakas*, and are entitled to succeed; Menu's Institutes (4). They are Gentiles; the Mitakshara (5), *Rutcheputty Dutt Jha v. Rajendernarain Rae* (1), *Rany Srimuty Debeah v. Rany Koond Luta* (2), Macnaghten's Hindu Law (6), *Gungadutt Jha v. Sreenarain Rai* (7), and Strange's Manual (8).

Their LORDSHIPS took time to consider, and on 28th June 1870, Sir R. PHILLIMORE delivered the following written judgment:—

The suit out of which this appeal arose was brought in the Court of the Principal Sudder Ameen of Goruckpore, by the plaintiffs, as heirs, after the death of his widow who survived him, of one Jaskaran Sing, to recover certain moveable and immoveable estate, the property of the deceased at his death.

The title as heirs was described generally in the plaint, but the course in which it was derived appeared by a pedigree exhibited by the plaintiffs and filed with the plaint. It thus appeared that the plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, Chatter Patti sing.

By the pedigree it appeared that the plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his great-great-great grandsons. The appellants contended that the plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the widow's death the heirs of the husband, at that time alive, were the legal heirs. The property claimed was at that time in the possession of the defendants, under alleged aliena-

(1) 2 Moore's I. A., 132.

(2) 4 Id., 292.

(3) F. 80, Nos. 43, 44.

(4) Ch. V, s. 60; Ch. 9, s. 187.

(5) Ch. II, s. 5

(6) Vol. II, p. 92.

(7) 2 Sel. Rep., 11.

(8) Ss. 309, 310, and 311.

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tions by the widow. Into the validity of their titles, respectively, no enquiry could be made by the Appellate Court in India, from the mode in which the case was submitted to it; and the appellants may be treated simply as parties who had a right to put the plaintiffs to proof of their title. It was conceded on the argument that they were not descendants of the common ancestor.

The defendants denied the plaintiffs' title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer that the plaintiffs were not within the line of heirs. They raised, also, two other objections in bar of any inquiry into their own title, viz., that the suit was barred by limitation of time, and that the matter of the plaintiffs' title was *res judicata*, and had been adjudged against parties in privity of title with the plaintiffs. As these two objections were not insisted upon on the argument of this appeal, it is unnecessary to state the facts as pleaded on which they rested.

The suit did not proceed in the Zilla court beyond the framing of issues, at which stage the Judge framed three issues in bar, involving the three points above stated. Deciding all three against the plaintiffs, he dismissed their suit. On the title he took the opinion of the Pundit of the Court, whose *vyavastha* was to the effect that the plaintiffs were beyond the line of heirs, and was in direct affirmance of the objection raised by the answer.

From this decision the plaintiffs appealed to the late Sudder Court of the North-Western Provinces, which reversed the decision of the Court below on all the three issues in bar, and remanded the case to the Court below for trial. The correctness of this decision on the second and third issues in bar admits of no dispute, and it is unnecessary to notice them further.

As no decision was given in the suit below except on the issues in bar, as the Sudder Court remanded the suit for trial, and as the appeal to her Majesty is limited necessarily to the decree reversing that of the Court below on the issues in bar, their Lordships will be careful to limit their observations, as well

as their decision in this case, strictly to the matter on which the decree under appeal proceeded.

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The decision in the Sudder Court, as well as that in the Court below, may be viewed as in the nature of a demurrer, on which any consideration of possible title on other assumed states of facts would have been irregular. The decision of this case involves the consideration of a most important part of that vexed and difficult subject—the Hindu law of succession. It must be limited to the validity of the title pleaded.

The title pleaded is that of some in the class termed Gentiles, asserting priority in that class. The derivation of title to the succession of the deceased opening on the death of his widow who survived him, is made necessarily from a common ancestor, who is named, and from whom the lines of the deceased and the claimants are respectively traced. The pedigree, if it be full and true, establishes community of family, kindred, and priority, unless the objection of the defendants be sustained; and nothing more is needed to be pleaded or proved, in support of that title, if valid. If it be not a good title of inheritance by the Hindu law, the plaintiffs' suit must fail. The issue in bar submits the objection to decision. The pedigree, for the purpose of the appeal, must be taken to be both full and true.

No objection founded on alleged facts not apparent on the face of the pedigree can be urged against a decree which did not proceed upon, and could not have proceeded upon, grounds not raised by the issue in bar. The question, then, is reduced to this, whether the plaintiffs, being great-great-great grandsons of the common ancestor, were too remote in degree to be heritable as Gentiles.

The subject is important: it is beset by difficulties raised by varying opinions, decisions, and comments on a text clear, enough, if interpreted by the principles of the Hindu law according to the Benares school, which is the most orthodox of the different schools. The governing authority of that school is the Mitakshara. The compiler of the Mitakshara is said to have been an ascetic, or devotee, and from that source nothing at variance with the religion of the Hindus is likely to have flowed. The Hindu law contains in itself the principles of its own

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exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindus, their Lordships observe that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary, the Judges of appeal overrule a former decision given in their own Court which, in their opinion, had disturbed it.

The Mitakshara, in the 5th and 6th sections of the 2nd chapter, recognizes two successive classes of heirs : first, 'Gentiles ;' next, 'bandhus ;' after them it places certain special persons, and after these last the State, the *ultimus hæres*.

Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The 'family' is the cherished institution of Hindus. Individual separate ownership is less the subject of the general remarks of commentators on the Hindu law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connexion derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the Mitakshara is in the strictest conformity to these principles. The Gentiles, or *gotraja*, from the *gotra*, are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families,—and such original bond of union is regarded as necessary to the constitution of the *gotra*. These

conditions are all that are stated as necessary to the constitution of the class of Gentiles.

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As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as *sapindas* and *samanodakas*; the first it treats as prior to the second, but excludes neither, with in limits wide enough to include the present plaintiffs. As the plaintiffs then in this case show a common ancestor a *gotra*, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the Mitakshara, it follows that it must be affirmed, unless it can be shown, that the plain language of the Mitakshara has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish *sapinda* from *sapinda*, nor define where *sapindas* cease and *samanodakas* begin. This is not a case of priority between two persons claiming as heirs, or between two classes of heirs; it is one of asserted exclusion from inheritance, raised by persons not competitors in the prescribed degrees of heirss.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus), viz., who best can confer on the deceased and his ancestors not fully benefited, the benefits, which the grades of oblations offer in differing degrees. Where no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal though slight, the principle of selection founded on superior

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efficacy is inapplicable to the solution of that question of precedence.

Had a course of decisions, or had the actual practice of Hindus, confirmed the view, which some framers of genealogical tables appear to have taken of this subject, it would have been the duty of the Courts of Justice to interpret the language of the Mitakshara by the aid of this modern light; but such is not the case, the weight of opinion and of decision is against the appeal.

The Sudder Court observed that the judgment below had followed a case which had been overruled in two succeeding cases in the same Court. It treated the overruled case as one which broke in upon the uniformity of the law. The Sudder further supported its opinion by the authority of two cases decided in the Privy Council. The case of *Rany Srimutty Debeah v. Ranee Koond Luta* (1) was governed by the law of the Mitakshara, but the point as to the calculation of the degrees for which it was cited as an authority was rather assumed than decided, for the decision proceeded on the ground that the Bengal school was the one to be followed in that case. In the case of *Butcheputty Dutt Jha v. Rajendernarain Rai* (2), the very passages of the Mitakshara and that from Menu, which has been relied on in this case, and in the Court of appeal in India, referring to the "seventh person," and the limits of the line of *sapindas*, received an authoritative exposition. That case it is true, was one to which the doctrine of the Mithila school was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. Harrington be carefully studied, it will clearly appear that the preponderance of the opinions of the various Pundits then consulted was greatly on the side of the literal construction of the Mitakshara. The judgment of the Privy Council concludes, that the *bandhus* do not inherit "till those on the father's side to the seventh degree have been exhausted." As the judgment is founded in a great degree

(1) 4 Moore's I. A., 292.

(2) 2 Moore's I. A., 132

on that of Mr. Harrington, and expresses no dissent from his method of arriving at the seventh person, by taking six degrees in the descending or ascending line, the Sudder Court was justified in treating this point as settled by authority, and the plaintiffs as Gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindu people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of *sapindas*, there is no reason for supposing that the plain construction of the language of the text of Menu, and of its authoritative comment, will clash with the religious feeling of Hindus.

Their Lordships are of opinion that the decision appealed from, on the materials before the Court on the issues in bar was correct, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

Appeal dismissed with costs.

[APPELLATE CIVIL.]

Before Mr. Justice L. S. Jackson and Mr. Justice Phear.

HAWABI (DEFENDANT) v. IBRAHIM SALI BHAY DAPTI (PLAINTIFF).^{*}
Act XXI of 1863, ss. 27, 39.—Appeal—Jurisdiction—Value of Suit—Value of Decree.

1870
 March 9.

The Recorder of Moulmein, in trying an administration suit, valued at rupees 13,000, found as to rupees 6,000 in value of the property claimed that it did not exist. The value of the amount decreed by him amounted to rupees 7,000.

Held that, under Act XXI of 1863, sections 27 and 39, the appeal lay in the first instance to the High Court, and not to the Privy Council.

THIS was an administration suit instituted in the Court of the Recorder of Moulmein on the 20th August 1868. The plaintiffs were Ibrahim Sali Bhay Dapti, husband of Assabi deceased, and

^{*} Regular Appeal, No. 207 of 1869, from a decree of the Recorder of Moulmein, dated the 18th February 1869.

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their children, Fatima and Zara, who sued through their father, The defendant, Hawabi, was mother of the deceased Assabi. The suit was brought to administer and divide the estate of the said Assabi in the several shares and proportions to which the plaintiffs and defendants were respectively entitled. It was valued at rupees 13,000. The prayer was to "order an account to be taken of all the property and effects realized to the estate of the deceased, and that such part of the estate as shall not consist of money be sold, and that the said estate may be divided, according to the Mahomedan law, between the parties."

The defendant claimed the landed property and certain bazar shares under a deed of gift alleged to have been executed in her favor by Assabi on the 17th September 1863.

The Recorder refused to believe that the document under which the defendant claimed was a genuine document. He also refused to believe the story of the plaintiff, or that he had made over any property of his wife to the defendant. He gave a decree as follows:—

"Declare that the estate of the late Assabi consisted of one-fourth share of the house and ground, described in grant No. 101, dated 12th August 1856, and fifty-eight shares in the big bazar, and direct the sale of the said estate accordingly, declare further that the shares in which the parties are interested in the estate of the late Assabi are as follows:—The first plaintiff to sixteen shares, viz., nine in respect of his right as husband, and seven in respect of the third child who died an infant and unmarried, leaving a vested interest at the deceased's death, equal in amount to that of the second and third plaintiffs. Each of the other plaintiffs are entitled to seven shares, and the defendant to six shares, the whole estate being divided into thirty-six shares, the case to stand over for further directions as to the distribution, until the proceeds of the said sale have been received."

The defendant appealed to the High Court; the grounds filed being, that the Recorder was wrong in finding that the deed was fraudulently executed; that it had been registered, which raised a presumption the other way; that the finding was against the weight of evidence; and that the Recorder was wrong in allotting the property as he had done in the decree.

. The value of the property covered by the decree amounted to about rupees 8,000. The appeal was therefore valued at that sum.

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A preliminary question arose as to whether, with reference to Act XXI of 1863, sections 27 and 39 (1), the appeal from the Recorder's decision lay to the High Court at Calcutta, or to Her Majesty in the Privy Council.

Mr. *Vertannes* for the respondent contended that, as the value of the claim was over rupees ten thousand, the High Court had no jurisdiction to entertain the appeal. The appeal properly lay to the Privy Council.

He also contended that the decree was interlocutory, and that it was an order in a case arising under Act XIX of 1841, which was an Act for the protection of moveable and immoveable property against wrongful possession in cases of succession; and therefore was not, under section 29 (2) of Act XXI of 1863 open to appeal.

Mr. *Broughton*, *contra*, contended that the High Court had jurisdiction, under section 27 of Act XXI of 1863. The appeal was from the decree. The decree did not involve

(1) *Act XXI of 1863, section 27.*—All suits heard and determined by a Recorder under this Act, in which the amount or value of the suit exceeds rupees three thousand, and be less than rupees ten thousand, an appeal shall lie to the High Court of Judicature at Fort William in Bengal, subject to the rules contained in the said Code of Civil Procedure regarding regular appeals.

force regarding appeals to Her Majesty in Council on decisions of the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction.

(2) *Act XXI of 1863, section 29.*—"All cases and proceedings arising under Act XIX of 1841, Act XXXV of 1858, Act XL of 1858, as amended by Act IX of 1861, or Act XXVII of 1860, may be received and disposed of by the Recorder of any Court established under this Act, subject always to all the rules and provisions as to jurisdiction and otherwise in the said Acts contained respectively. Orders passed by the Recorder in cases arising under the said Acts shall not be open to appeal, but the parties shall be at liberty to contest such a decree in a regular suit."

Section 39.—In all suits heard and determined by a Recorder under this Act, in which the sum or matter at issue is rupees ten thousand or upwards, or in which the judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to, or respecting property of, the value of rupees ten thousand or upwards, an appeal shall lie to Her Majesty in Council, subject to the rules and orders for the time being in

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any claim, &c., to property, the value of which exceeded rupees 10,000. The value of the decree was considerably under that amount. When a suit has been laid at over rupees 10,000, and the value of the whole amount decreed is below that sum, the appeal lies to the High Court. No appeal lies to the Privy Council, when the amount and interest decreed together do not amount to rupees 10,000. *Maharajah Suttees Chunder Roy v. Gunes Chunder* (1), *Sreemutty Rane Surnomoye v. Maharajah Suttees Chunder Roy* (2), *Gooroopersaud Khoond v. Juggut Chunder* (3). In *Prannath Roy Chowdry v. Rane Surnomoye* (4), the plaintiff valued his claim at over rupees 10,000. The Zilla Judge decreed a less sum, and the Sudder Court dismissed the plaintiff's claim altogether. The Privy Council admitted an appeal, the appellants claiming to open the question of the value of the subject-matter. This was not the case here.

The following was the judgment of the Court upon the preliminary questions :—

JACKSON, J.—It seems to me there is nothing in the objections raised against the hearing of this appeal. The decision appealed against is not, so far as I can see, an interlocutory one, but a final decision disposing of the points at issue between the parties.

It seems to me, also, that it is not a decision of the Recorder upon any case under any of the Acts specified in section 29, Act XXI of 1863. It is, in fact, a regular suit for the purpose of dividing and distributing the assets of the estate of the deceased Assabi. I think, therefore, it is a decision in a regular suit, and one subject to appeal.

Another objection has been raised which seemed to arise on the face of the decree, namely, that the case did not come within the 27th section of Act XXI of 1863, that is to say, that the subject-matter of the suit was not above rupees 3,000, and less than rupees 10,000. It is unquestionable that the suit, as originally framed, did relate to property exceeding rupees 10,000 in value, that is to say, to rupees 13,000; but

(1) 8 Moore's I. A., 164.

(2) *Id.*, 165.

(3) 8 Moore's I. A., 166.

(4) 7 *Id.*, 553.

then seeing that a part of that property valued at rupees 6,000 has been shown in the opinion of the Court below not to have existed, and the suit in respect of such property has been altogether dismissed, it results that the amount or value of that portion of the suit that remains and forms the subject of appeal, is less than rupees 10,000; and it appears to me, upon a fair construction of sections 27 and 39 of the Act, that the appeal which is now before us, relating as it does to a property less than rupees 10,000, is cognizable by this Court.

Appeal admitted.

[ORIGINAL CIVIL.]

Before Mr. Justice Norman.

IN THE MATTER OF JOHN BODRY, AN INSOLVENT.

1870
July 11.

Distress—Vesting Order, Time of Operation of—Priority of Official Assignee.

A distress levied after the filing of the petition of insolvency, but before the vesting order is drawn up, is invalid as against the Official Assignee.

A vesting order is made when it is given by the Court, and not at the time it is drawn up, signed, and sealed.

THIS was an application, on notice, for an order that the Official Assignee and assignee of the insolvent J. Bodry should forthwith release the property of the insolvent distrained by his landlord, Alibax Cazi, on July 1st; and that the same should not be sold by him, or, if sold, that the said Alibax Cazi should be paid the full amount of rent due to him by the insolvent from the proceeds of sale; and that the costs of the application be paid by the Official Assignee.

From the affidavits put in in support of the application, it appeared that certain premises in Calcutta had been let on lease by Alibax to J. Bodry at a rent of rupees 275 per month, payable on the 15th day of each succeeding month for the month past; that the bills for rent for the first five months of 1870 were presented to him for payment as they respectively became due, but he omitted to pay them, until in June 25th, he paid rupees 100 for part of January, and promised to pay

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the balance for January, *viz.*, rupees 175 by the 6th July; that the five days after the payment, *viz.*, on the first July, Alibax was informed that J. Bodry intended to take the benefit of the Insolvent Act, and he thereupon on the same day instructed his attorney, Mr. Fink, to distrain the property of the said John Bodry for rupees 1,275, being the amount for the first five months of the year less rupees 100 already paid; that he granted and signed a warrant of distress to one of the bailiffs of the Sheriff of the town of Calcutta, authorizing him to distrain the premises; that the bailiff did, accordingly, on July 1st, at 12-15 P. M. distrain four billiard tables on the said premises, the property of the said J. Bodry, but the Official Assignee claimed to be in possession on behalf of the creditors of the said J. Bodry.

It also appeared that prior to the seizure by the bailiff, J. Bodry had filed his petition of insolvency, but that no vesting order had been sealed, signed, or deposited with the Assignee; and that no schedule had been filed or presented by the said insolvent, nor was there then filed or presented any order or petition for time to file the schedule.

Mr. *Hyde*, in support of the application, contended that the 6th section of the Insolvent Act made it necessary for the insolvent, at the time of presenting his petition, to present his schedule also, or to obtain further time from the Court in which to file it; that neither of those alternatives having been complied with in this case, the vesting order made therein was invalid; and that a distress made between the filing of the petition of insolvency, and the making of the vesting order, was valid as against the Official Assignee.

The effect of the vesting order, made under section 7 of the Insolvent Act, is to vest all the property in the Official Assignee; and at Common law, a distress made on the property, while left on the premises, would be perfectly legal one. But by section 22 of the Insolvent Act, it is enacted that, "after the making of the vesting order, no distress shall be made for rent due before the vesting order;" the section does not preclude a distress being made between the filing of the petition and the making of the vesting order. The words of the English Act, 7 & 8 Vict., c.

96. s. 18 are different ; there the filing of the petition is the time fixed, after which no distress levied would be valid. If the Legislature had intended the Indian Act to be the same, the same words would have been introduced as in the English Act. Such distress was valid, even though no sale had taken place under it.—*Wray v. the Earl of Eyremont* (1), the case decided on the Insolvent Act, 7 George IV, c. 57, s. 31.

Mr. *Ingram*, for the Official Assignee, contended that the distress having been made after the filing of the petition, was invalid. Section 22 of the Insolvent Act makes it invalid if made after the vesting order ; and by section 7, the filing of the petition and the making of the vesting order are contemporaneous and date from the same time ; the words are :—" upon the filing of any such petition as aforesaid, it shall be lawful for the Court, and the Court is hereby authorized and required to order, &c. ;" and the vesting order must be taken to be made and operative when delivered orally by the Court, and not only after the time occupied in writing it and signing and sealing it.

Mr. *Hyde* in reply.

NORMAN, J.—The vesting order must be deemed to have been made, at the time when it is given by the Court, and not from the time when it is possibly drawn up. The distress, having been made after the time when the vesting order was thus made, was invalid. The application is refused with costs.

Application refused.

Attorney for applicant : Mr. *Fink*.

Attorney for the official assignee : Messrs. *Carruthers & Co.*

[PRIVY COUNCIL.*]

1870
March 1.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v. MUSSAMAT KHANZADI (PLAINTIFF).

ON APPEAL FROM THE HIGH COURT, NORTH-WESTERN PROVINCES,

Acts of Government Officials Binding Government—Act IX of 1859.

Where, by a decree of the Special Commissioner's Court, established under Act IX of 1859, a decree was made directing property to be made over to a claimant, the proceedings of officials making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or of the making over of the bulk of the property under it, held to bind the Government as to the right of the decree-holder to the property.

In 1852, one Sheikh Mahomed Abdulla Khan died, leaving a son, Abdul Latif Khan, and two daughters Bibi Mariam and the respondent. To the former, Abdul allotted five villages as her share of their father's estate; but as he made over nothing to the respondent, she in April 1857 sued for her share.

Abdul was, pending the suit, convicted of rebellion, and the property was confiscated under Act XXV of 1857.

The respondent in 1860 applied to the Court of Special Commission, appointed under Act IX of 1859, for a revival of the suit against Government, so as to establish her right to the share of her father's estate. The Court refused the relief prayed, but gave the following order:—"Further, a decree is passed assigning to the plaintiff for food and maintenance five villages at, &c., equal in area, Government assessment, and income to" the villages given to Bibi Mariam by her brother. They then ordered possession to be given with mesne profits from the date of the action.

The government authorities then determined to allow her to select the five villages, subject to approval of the Revenue

* *Present*:—THE RIGHT HON'BLE SIR JAMES COLVILLE, SIR R. PHILLIMORE, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEARL.

authorities ; and she having done so, the Collector held a proceeding as follows :—

“ Copy of a letter of the Sudder Board of Revenue was received, dated the 28th July, as per docket No. 361, bearing date the 3rd August of the same year, sanctioning the grant of mauzas (naming them) bearing a jumma of rupees 2,476-4, agreeably to a decree of the Court of Special Commission to Mussamat Khanzadi Begum.

“ It is ordered that the tehsildar be directed to put the aforesaid lady in possession, and thereafter forward the usual *dakhilnama*, and that her name be entered in the Government papers as proprietor. The tehsildar is also to make the usual demands from her for the payment of Government revenue.”

She was then put in possession, received the mesne profits from the date when Government had entered into possession, and gave *dakhilnamas* on the 14th August 1860. There was one little portion as to which the Collector doubted its Belonging to the property, whereupon the respondent brought a summary suit for possession in execution of the order, and the Judge decreed in her favor.

The respondent then applied to the authorities for the mesne profits between the date of her instituting the suit, until Government took possession according to the decree. The Sudder Board of Revenue demurred to this payment ; and in a letter of 7th October 1861 to Government, expressed a doubt as to whether the decree of the Commissioner's Court was legal. To this the Lieutenant-Governor replied, saying that the decree was not one which the Commissioner's Court had power to make ; they having dismissed her suit as claiming a share of the estate, but granting her a maintenance for which she had not sued. His Honor also found fault with the district officers of Government in carrying out the decree, as the property, the respondent was put in possession of, was more valuable than she was entitled to, and ordered her to be dispossessed, and other villages of the same value, as those given to her sister, to be given to her. He also refused to pay the balance of mesne profits. The Collector ousted her in January 1862.

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She then instituted a summary suit to enforce the decree, but the Judge dismissed it, which dismissal was on appeal affirmed, on the ground that the decree did not appear to have been properly carried out.

She then brought this suit to establish her right to the property, and for possession and mesne profits.

The Government, by way of defence, set up a case that the villages were made over to the respondent, subject to the confirmation of Government which had not been obtained, a defence which the Judge considered to be established.

On appeal, the High Court (1) adopting the principle that the acts of a Government officer acting within his authority binds the Government (2), reversed the decision.

The Government now appealed to Her Majesty.

Mr. *Forsyth*, Q. C., and Mr. *Merivale* for the appellant.

Sir *Roundell Palmer*, Q. C., and Mr. *Leith* for the respondent.

The Judicial Committee, without calling on the counsel for the respondent, gave the following Judgment:—

Their Lordships are of opinion that there is no ground whatever for this appeal. The respondent's title rests upon the decree of the Commissioners, and it has not been alleged on the part of the Government, in their pleadings or otherwise, that that decree was other than a proper and binding decree; their Lordships certainly see no reason why it should not be binding; the plaint on which it is founded is for actual possession of the land, but it is quite consistent with that plaint that a decree should be made, falling short of the extent to which the plaint went. The decree is in these terms:—"A decree is passed, assigning to the plaintiff for her food and maintenance five villages in Zilla Hulandshahar, equal in area, Government assessment, and income, to Mauzas Lukhwali and Subi,

(1) Sir Walter Morgan. C. J., and Mr. Justice Pearson.

(2) Collector of Masulipatam v. Cavali Venkata Nurrainapali S. Moo. E. I. Ap., 554.

and Ramghar and Dowlatabad of Pergunna Siana; and "Siorampur, Pergunna Achar, which were given in gift to Bibi Mariam, agreeably to a deed of gift dated the 22nd of July 1854. This decree is to be carried into execution, and the plaintiff put into possession of the villages; and she is, moreover, to receive the mesne profits from the date of action brought, up to the date of being put into possession."

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At the date of the decree, the Government was in possession, and the proper person to give possession, and to carry out this decree, was the Collector. Their Lordships cannot at all come to the conclusion that the regulation or the circular to which reference has been made in any way affected the authority of the Collector (1). If the matter stood simply on the act of the Collector, their Lordships would hesitate long before they could accede to the view which has been advanced on the part of Government; but on turning to page 27 of the Appendix (2), what actually appears is,—that there were proceedings in the Civil Court founded on the decree—that the Government appeared in the Civil Court, raised no objection whatever, except as to a certain particular portion of the land of which possession was given, and that there was a decision by the Civil Court against the Government; consequently, the respondent's title was confirmed by the decree of a competent Court.

For these reasons their Lordships are of opinion that the Government was much in the wrong in taking possession as they did, and that this appeal never ought to have been brought. Their Lordships will, therefore, humbly advise Her Majesty that it be dismissed. The dismissal should be with costs.

Appeal dismissed.

Solicitors for appellant: Messrs. *Lawford and Werburham*.

Solicitor for respondent: Mr. *Wilson*.

(1) Circ. Ord., Rev. Dep., N. W. P., cover the portion of the land which the Collector doubted being included in the No. 293, 10th April 1853.

(2) This was the summary suit to re-land assigned to the respondent.

[APPELLATE CIVIL.]

*Before Mr. Justice Bayley and Mr. Justice Markby*1870
May 6.ASRAFANNISSA BEGUM (PETITIONER) v. SYAD INAET HOSSEIN
(OPPOSITE PARTY).**24 and 25 Vict., c. 104, s. 15—Jurisdiction—Power of the High Court—Review.*

The lower Appellate Court admitted a petition for a review of its judgment after a lapse of ninety days from the date of the decision without recording that just and reasonable cause for the delay had been shewn.

On an application, under section 15 of the Charter Act to the High Court to set aside the order of the lower Court, on the ground that that Court had no jurisdiction to entertain an application for review after a lapse of ninety days, without recording that there was just and reasonable cause for the delay, the High Court refused to interfere.

ASRAFANNISSA petitioned the Court as follows:—

“One Syad Inaet Hossein sued your petitioner for the recovery of 315 bigas as maintenance due under an agreement dated 9th August 1855, alleged to have been executed by your petitioner in favor of one Nazimannissa, whose rights under it were sold in execution of decree, and purchased by the aforesaid Syad Inaet Hossein on 26th July 1866. The Court of first instance dismissed the plaintiff’s claim; on appeal by the plaintiff, the Judge of Patna, on the 23rd June 1868 confirmed the judgment of the first Court, with regard to a portion of the claim, and remanded the case with regard to the remainder.

“On 21st August 1869, the plaintiff filed an application for review of the aforesaid judgment, and the Court of appeal thereupon altered its former judgment.

“Your petitioner submits that this last order is liable to be set aside, inasmuch as the plaintiff’s application for review has been admitted without any valid cause being made out for the delay, notwithstanding the application for review was filed more than ninety days after the date of the decree of the

* Rule *Nisi*, No. 334 of 1870.

“Appellate Court. Your petitioner therefore prays that a rule
 “be issued upon the aforesaid Inaet Hossein to show cause
 “why the order passed by the Judge of Patna in his appli-
 “cation for review be not set aside, and the original decree,
 “dated 23rd June 1868, be not restored.”

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A rule *nisi* was thereupon issued calling upon Syed Inaet Hossein to shew cause, within twenty one days of service of notice upon him, why the order of the Judge of Patna passed upon the application for review of the said Inaet Hossein should not be set aside as passed without jurisdiction, upon the ground that it did not appear that the application for review had been presented within the period of ninety days from the date of the former decree, or that any just and reasonable cause had been shewn, for the same not having been presented within the said period of ninety days, or that the question whether there was any reasonable cause for the delay had been in any way considered by the Judge, and also upon the ground as to whether the plaintiff having elected to adopt and act upon the order of the 23rd June 1868 was not bound by the same.

Munshi Mahomed Yusaff (Mr. Gregory with him) shewed cause. He contended that the mistake of a Judge to administer the law properly did not constitute an improper exercise of jurisdiction. The case was cognizable by the Judge. He was fully empowered to entertain any application for a review of his own judgment; and if he had committed a mistake in not recording his reasons, when the application was made after a lapse of ninety days, a mistake of law was not an improper exercise of jurisdiction.

Baboo Rames Chandra Mitter, in support of the rule, contended that, under section 377, Act VIII of 1859, the question was one of jurisdiction. The Court is not empowered to entertain an application for review after a lapse of ninety days from the date of the decree, unless just and reasonable cause be shewn to the satisfaction of the Court for not having preferred the application within the limited period. The present case is distinguishable from a case where a Judge misunderstood or misinterpreted

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the law, Here he had no power to receive the petition, unless sufficient cause was shewn to his satisfaction for the delay. *Mahomed Gazi Chowdhry v. Dullab Bibi* (1) is in point.

(1) *Before Mr. Justice Bayley and Justice Sir C. P. Hobhouse, Bart.*
The 8th January 1869.

MAHOMED GAZI CHOWDHRY AND
 ANOTHER (DEFENDANT) v. **SRIMATI**
DULLAB BIBI (PLAINTIFF).*

Baboo Srinath Das for appellants.

Baboo Nalit Chandra Sen and Moulee Syad Murhamut Hossein for respondents.

HOBHOUSE, J.—The facts of this case on the sole contention now before us are these:—

On the 4th September 1865, corresponding with the 20th Bhadra 1272, the plaintiff, who is the respondent before us applied under section 299 of Act VIII of 1859, to be allowed to sue as a pauper.

On the 22nd Bhadra 1272 (September 6th, 1865), the plaintiff was examined; and after such examination, a day was fixed for the hearing of the application on the question of pauperism under sections 305 and following of Act VIII of 1859. Evidence was subsequently taken on both sides on the question of pauperism, but that question was not at that time determined by the Court, but the Court on the 7th June 1866, corresponding with the 25th Jaishtha 1273, rejected the plaintiff's application to be allowed to sue as a pauper, the ground of rejection being that, within the meaning of section 304 of the Code of Civil Procedure, the claim was barred by the Statute of Limitation.

On the 7th May 1867, the plaintiff applied for a review of the judgment; that review was granted, and the plaintiff was permitted to sue as a pauper, and finally obtained a decree in his favor in the Court below.

The defendant, appellant, now before us, takes a preliminary objection to the entertainment of the suit. He argues that the refusal to permit the plaintiff to sue as a pauper was final; that the application for review was in the nature of a "subsequent application of the like nature"; and that within the meaning of section 310 of the Code, the Court had no jurisdiction to entertain and grant such application.

On the other hand, the plaintiff contends that the application was not in the nature of a second application for permission to sue as a pauper, but in the nature of an application for review; that the Court below had jurisdiction to entertain it, and so had jurisdiction to determine the suit.

The point has been very ably argued by the pleader for the plaintiff, Baboo Nalit Chandra Sen, and for myself I must say that his arguments impressed me at first sight convincingly, and that on a point on which I was in the first instance against him. But on a full consideration of the bearings of the case we are compelled, I think, to give judgment against the plaintiff on another ground. We find, without expressing any opinion as to whether the Court's refusal to allow the plaintiff to sue as a pauper was final, or whether any application for review could or could not be entertained, that the application in question was not made within ninety days of the order to which it referred, and not only was this so, but no just and reasonable cause was stated, much less shewn, to the lower Court why, after such a lapse of time *vis.*; eleven months, it should have entertained the application for review. It follows, therefore, that, in *Shama Churn Chuckerbutty v. Bindabun Churn*

* Regular Appeal, No. 18 of 1868, from a decree of the Judge of Tipperah, dated the 20th September 1867.

* BAYLEY, J.—I am of opinion that this rule ought to be discharged with costs. The ground of this application which is made, under section 15 of the Charter Act, is that, whereas the lower Court admitted the review after a period of ninety days, without recording any reasons for having been satisfied that there was good and sufficient cause shewn for the delay, the lower Court acted without jurisdiction. A case has been cited, *Mahomed Gaze Chowdhry v. Dullab Bibi* (1), in which it is said to have been held that such an act would be without jurisdiction. Now, in the first place, that case was one of regular appeal, this is one under section 15 of the Charter Act. I cannot admit, as we are asked to admit, the principle that an application under section 15 [must necessarily be governed by *dicta* in regular appeals, nor that where one Judge of one Division Court passes an opinion different from that passed by another Division Court, it must be considered a conflict of decision, and necessitate a reference to a Full Bench.

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It is said that this is a case in which the Judge acted without jurisdiction, because, until he complied with the requisition of the law in regard to the admission of reviews after ninety days, that is to say, stated that he was satisfied that there was good and sufficient cause for the delay, he could not admit the application and try the case, therefore had no jurisdiction. I think, however, that in this case the lower Court had jurisdiction, although it may have failed in actually carrying out all the particulars of the law. It is not in every case where a Judge does not comply with all the provisions of the law that he acts without jurisdiction, and it is clear that in this case the cross-litigation which was going on between the parties and the reasons which *der Roy* (2), the lower Court had no jurisdiction to entertain the application for review, and had no jurisdiction, therefore, to entertain the suit founded on the admission of that application.

BAYLEY, J.—I concur in thinking that the application for review was altogether too late; that no good and sufficient cause was shewn for the delay; and that therefore the application could not be entertained.

In this view of the case, I think that the plaintiff's suit must fail; that the decision of the Court below must be set aside, and the appellant get a decree with all costs of this Court and of the Court below.

I entirely concur with Mr. Justice Hobhouse as to the able manner in which the case has been argued by the respondents' pleader, Baboo Nalit Chandra Sen.

(1) See *Ante*, p. 318.

(2) 9 W. R., 181.

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are recorded in the pleadings, viz. that the High Court decision in one case, might affect the rights of the parties in another, are circumstances which the Judge of the lower Court could, and it must be presumed he did, look to and consider a sufficient cause for admitting the review.

It has been held, by almost concurrent decisions of this Court, that ordinarily cases under section 15 of the Charter Act should only be admitted when the Judge has refused a jurisdiction which he has, or exercised a jurisdiction which he has not. Without saying that the terms of this section do not enable us to go beyond that, I will simply confine myself to saying, following those decisions, that under the circumstances of this case, although the admission of the review by the Judge after the lapse of ninety days, without specifying any reasons for his being satisfied as to the reasonableness of the delay, may not have been in exact accord with the course of procedure prescribed, still it was not without jurisdiction; nor is it a case otherwise in which we should exercise the extraordinary powers vested in us under section 15 of the Charter Act. I would discharge the rule with costs.

MARKBY, J.—I also think that this rule ought to be discharged. The facts of the case are peculiar. There were two concurrent suits, in one of which Inaet Hossein was seeking to recover the arrears of a monthly payment which he had bought in execution of a decree against Nazimannissa, and the other was a suit in which the person entitled to the monthly payment was seeking to set aside this sale. The Judge in appeal had disposed of both the suits in a manner which was adverse to the claim of Inaet Hossein. Inaet Hossein then appealed to this Court in one suit only, not being able to appeal in the other, as it was a suit to recover money below rupees 500. Then, when this Court on appeal reversed the decision of the Judge below in the case before it, the Judge thought it proper, although ninety days had elapsed, to give Inaet Hossein an opportunity of having what then became a manifest error in the judgment in the other suit corrected by way of review. This seems to me to be almost precisely the same thing as was done by KEMP and GLOVER, JJ., in *Sutto Sur-*

run Ghosal Bahadoor v. Tarini Churn Ghose (1). Whether or not, if the order which the Subordinate Judge made in admitting the review were now before us on appeal, we should say that the Judge was right in making that order is a wholly different question. I would rather have said, with the greatest respect for the opinion of the two learned Judges, that the Judge was not right, but that is not a circumstance which should induce us to exercise the extraordinary power of superintendence which we possess under section 15 of the Charter Act, and set aside the order of the Judge passed in the case now before us. It may not be easy to say exactly what degree of illegality in the proceedings of a Judge will deprive him of jurisdiction, nor is it in the least degree necessary that we should in this case exactly define what the limits of his jurisdiction are. As pointed out by Mr. Justice Bayley, our action under section 15 is wholly discretionary; and looking to the peculiar circumstances of this case, and to the fact that the Judge was only trying to keep consistency between the two suits, in accordance with what the High Court laid down as the law, I am of opinion that we should not interfere in it.

I may add that I should not be inclined to agree in the view which Mr. Justice Hobhouse is said to have taken in *Mahomed Gazez Chowdhry v. Dullab Bibi* (2) that this is an order which in any sense can be said to be made without jurisdiction.

Rule discharged.

Before Mr. Justice Bayley and Mr. Justice Markby.

BHAWABAL SING (DEFENDANT) v. MAHARAJA RAJENDRA PRATAP
SAHOY BAHADUR (PLAINTIFF).*

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Benami Purchase—Suit for Confirmation of Possession and Declaration of Title—Review—Decree—Declaratory Decree—Res Adjudicata.

A, brought a suit for a debt against B, obtained a decree, and attached certain land in execution. C, intervened, claiming the property as his; but, on the 28th March 1868, his claim was disallowed, on the ground that in two suits previously brought against C and others for possession of the same property, on the 30th December 1863

* Regular Appeal, No. 108 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 25th February 1869.

(1) 3 B. L. R., A. C. 287.

(2) *Ante*, p. 318.

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by X. and Y., whose interest had, pending the suit, been purchased by B., it had been decreed that the land belonged to B. The decrees in these suits were dated 13th and 19th January 1864; they were in favor of B., and ran in his name alone. C had purchased a moiety of the property at an auction-sale on the 7th March 1859; X. and Y. claimed under a pre-existing mortgage over the same property, the equity of redemption under which had been foreclosed.

C. now brought a suit against A. and B. for confirmation of his possession, and a declaration of his title to the property. He alleged that B. was his servant, and had purchased the interest of X. and Y. in the property *benami* for him; that he (C.) had made the purchase with his own money in the name of B.; that the suits, originally brought by X. and Y., had really been compromised; that while the decrees of the 13th and 19th January 1864 were nominally in favor of B., they were really in his (C.'s) favor; and that the suit brought by X. and Y. had been allowed to proceed in B.'s name, in order that C.'s title might be strengthened by a decree in his favor, B. being only nominally the decree-holder. C. also stated that, since his purchase on the 7th March 1859, he had always been in possession, and he dated his cause of action from the 23rd March 1868, when his claim to the property which had been attached by A. in his suit against B. was disallowed.

The Subordinate Judge gave a decree in favor of the plaintiff C.

B. alone appealed to the High Court.

Held, that C. not having been disturbed in his possession, and seeking a declaration of his title only and no relief, should have stated clearly and precisely what that title was; that as against A., who had not appealed, the decision of the Subordinate Judge was final; that as between B. and C. the matter was *res adjudicata*; that C. could not go behind the decrees of the 13th and 19th January 1864, which had been passed in favor of B., and show that the purchase by B. and subsequent decrees were really *benami* for C. and in his favor. A decree, until it is set aside, between the parties to it, conclusive both as to the rights of those parties and the character in which they sue.

On application for review of judgment, *held* a party applying for a review of judgment must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous. In so showing cause (*first*) no point can be raised, which has been already dismissed and decided on the original hearing of the appeal; and (*secondly*) no new point, which has not been raised at the hearing of the appeal, can be argued on the application for review.

THE plaintiff in this case was Maharaja Rajendra Pratap Sahoy Bahadur.

The defendants were Bhawabal Sing and Chartarbhuji Das.

The suit was brought on the 2nd July 1858, in the Court of the Subordinate Judge of Sarun, under the following circumstances:—

The plaintiff alleged that certain persons, named Jitan Lal and Udit Narayan, were originally the proprietors of an 8-anna share in Mauza Mahnar. On the 7th March 1859, the interest

of the sons of Jitan Lal, i. e. 4-annas, was sold by the Court in execution of a decree. The plaintiff purchased and entered into possession. Prior to this, however, Jitan Lal and Udit Narayan had executed a deed of mortgage, in favor of one Sambhu Tewari, and Sambhu Tewari had sold one-half of his rights to Tiag Ali, and the other half to Tilack.

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In the year 1863 two suits were instituted, one by Tiag Ali against the present plaintiff, Rajendra Pratab Sahoy, and three others; and the other by Tilack against the same persons. The suits were exactly identical, except as to the person of the plaintiff. Tilack and Tiag Ali, each sought to recover possession of 4-annas of Mauza Mahnar, each founding his title on the share which he had purchased on the mortgage to Shambhu Tewari, the equity of redemption under which had been foreclosed. In each suit also the defence was that this mortgage was a fraudulent one.

While these suits were going on, that is to say, on the 30th December 1863, Tilack and Tiag Ali each sold their rights to Bhawabal Sing, the first defendant in the present suit. Bhawabal Sing's name was substituted for Tilack and Tiag Ali respectively, and the suits proceeded.

Early in the year 1864, these suits were finally heard and decided; and in each suit Bhawabal Sing obtained a decree for possession and mesne profits against Rajendra Pratab Sahoy (the present plaintiff) and the other parties. The decrees were dated 13th January 1864 and 19th January 1864 respectively. Execution was taken out, the mesne profits were assessed, and Bhawabal Sing was put into possession.

Rajendra Pratab Sahoy, the present plaintiff, alleged that the purchase which was made in the name of Bhawabal Sing was really a purchase by himself with his own money in the name of Bhawabal Sing, his servant. That he made the purchase, with a view to strengthen his title, which he had acquired at the auction-sale of Jitan Lal and Udit Narayan's interest in the property on the 7th March 1859, fearing that such title might be injured by the previous mortgage in favor of Sambhu Tewari, whose interest in the property had been purchased by Tilack and Tiag Ali; that the suits instituted by the last named persons on the 30th December 1863

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were really compromised, and that they were merely allowed to proceed in his servant's name, in order that he might obtain a decree for his master's benefit; moreover that, in fact, Bhawabal Sing never did remain in possession of the property, although it always stood in his name; and that subsequently on quarrels arising between himself and the defendant, Bhawabal Sing, the latter set up a fraudulent claim to hold the property in suit as his own.

On the 22nd April 1867, Chatarbhuj Das, defendant No. 2, claiming to be a creditor of Bhawabal Sing, obtained a decree, applied for execution, and attached this property.

The plaintiff stated this to be a collusive proceeding between Chatarbhuj and Bhawabal Sing, and that (plaintiff) applied to the Principal Sudder Ameen, in whose Court the decree was, under section 246 of the Code of Civil Procedure, to release the property from attachment, on the ground that it belonged to himself, and not to Bhawabal Sing. The Principal Sudder Ameen on the 28th March 1868 refused to release the property.

The plaintiff then brought this suit, in which he asked for confirmation of his possession and a declaration of his title to an 8-anna share in Mauza Mahnar, to protect his property from execution by setting aside the proceedings taken by Chatarbhuj upon the decree of 22nd April 1867, and to order his name to be registered in the Collector's books as owner. The plaintiff based his title upon his purchase in the name of Bhawabal Sing, dated the 30th December 1863. He dated his cause of action as arising on the 28th March 1868, when his claim to the property in dispute, which had been attached by Chatarbhuj in his suit against Bhawabal Sing, was disallowed by the Principal Sudder Ameen. Both defendants in their written statements asserted that the property belonged to Bhawabal Sing, and not to the plaintiff, and both relied on the decrees of the 13th and 19th January 1864, under which Bhawabal Sing recovered possession of the property against the present plaintiff.

The issues in the suit were settled on the 10th December 1868. The following issues were fixed by the Subordinate Judge :—

First.—Whether or not the plaintiff is in possession of the dis-

puted property ; and, if not, whether or not the claim for confirmation of possession can be sustained ?

Second.—Whether the defendant, Bhawabal Sing, was the actual purchaser of the disputed property, or was he a mere nominal purchaser and a servant of the plaintiff ?

The defendant asked the Subordinate Judge to fix two other issues :—

Whether the plaintiff's suit was barred by the decrees of 13th January 1864 and 19th January 1864 respectively ?

Whether the plaintiff's suit would lie ?

The Subordinate Judge refused to add these two issues. Upon the issues fixed, the Subordinate Judge found that, ever since the purchase in 1863, the plaintiff had been in possession. He also found that Bhawabal Sing was not the actual purchaser of the disputed property, but that he was a mere nominal purchaser on behalf of the plaintiff. And upon this finding, he gave a decree declaring that the plaintiff should be confirmed in the possession of the disputed property as heretofore, and should get his name registered in the office of the Collector, and that the summary order of “ *this* ” Court (1) should be set aside.

The defendant, Chatarbhuji, did not appeal against this decision.

The other defendant, Bhawabal Sing, alone appealed.

The argument was mainly confined to the four following grounds of appeal which were filed *inter alia* :—

First.—Notwithstanding your petitioner's prayer, the lower Court was wrong in not laying down an issue regarding the present suit being *res judicata*.

Second.—If the kabala dated 30th December 1863 be benami, your petitioner could not have obtained a decree against the plaintiff, if that fact had been pleaded in the case ; he not having raised that defence, and a decree having been passed in your petitioner's favor against him, the matter is clearly *res judicata*.

Third.—In execution of that decree, your petitioner having obtained possession of the property in dispute from the hands of the defendants (amongst whom the present plaintiff was one),

(1) i. e., apparently, the order of the Principal Sudder Ameen, directing the property to be attached.

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and afterwards realizing wasilat also, the plaintiff is not entitled to contradict the evidence furnished by solemn record of a Court of justice by showing that it was all sham.

Fourth.—There is no tangible reason ascribed by the plaintiff to account for the facts of the kabala of 1863 being benami; and if the statements made by Binda Lal and others be taken to mean that recourse was had to this benami to gain an advantage over the plaintiff, co-defendant, in the former case, such a plea should not be heard in a Court of Equity.

Baboos *Rames Chandra Mitter* and *Mahes Chandra Choudhry*, for the appellant, contended that the plaintiff could not go behind the decrees of the 13th and 19th January 1864, which stood in the name of the defendant, and show that they were really in his favor. *Bihans Kunwar v. Bihari Lal* (1) was relied on as showing that the policy of the Procedure Code was not to allow extrinsic evidence to contradict facts appearing on the record of a case. *Mussamut Wafeeah v. Mussamut Shahaba* (2) was cited in support of the argument that the question as to the right of Rajendra Pratap Sahoy to the property was *res-adjudicata*, he having had to rely on his purchase in defence of the previous suits.

Mr. *Allan*, for the respondent, contended that the plaintiff was at liberty to show that he had himself brought the property in the benami name of Bhawabal Sing, and that the suits in January 1864 were in fact compromised. Plaintiff merely wished to have the title which he already possessed strengthened by a decree of Court. The cause of action and the subject-matter of those suits, and the issues to be tried, were wholly different to the cause of action, subject-matter, and issues in the present suit. The question was therefore not *res-adjudicata*. In pleading *res-adjudicata*, it must be shown that the cause of action was the same in the two suits—*Mussamut Munna Jhunna Koonwur v. Laljee Roy* (3), *Mahabeer Pershad v. Lalba*

(1) 3 B. L. R., F. B., 15.

(3) 1 W. R., 121.

(2) 8 W. R., 307.

Ram Bahadur (1); and between the same parties—*Umes Chandra Roy v. Nabin Chandra Mazumdar* (2), *Chunder Shekhar Deb Roy v. Doorgendro Deb* (3), *Maharaj Sing v. Mussamut Beela Kooer* (4), *Rajah Nugendur Narain v. Rughoonath Narain Dey* (5), *Ram Sarun Singh v. Mussamut Pran Pearee* (6) *Bissessuree Debee v. Jankee Doss Mohunt* (7); plaintiff could prove the benami nature of the purchase by *Bhawabal Sing—Kalee Mohun Pal v. Bholanath Chakladar* (8), *Chiniya Mudali*

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(1) *Before Mr Justice Kemp and Mr. Justice Glover.*

March 4th, 1869.

MAHABIR PRASAD v. LALA RAM
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KEMP, J.—The plaintiff, special respondent, purchased the estate in dispute from Baboo Lal Jha, defendant No. 1; and defendant No. 1. Baboo Lal Jha purchased the property from defendant No. 2, Gopal Lal. Baboo Lal Jha sued Gopal Lal for confirmation of possession, registration of name, and establishment of right, and that suit was dismissed. The plaintiff in the present suit purchased from Baboo Lal Jha, during the pendency of that suit. The Court of first instance has substantially held, that, because the suit of Baboo Lal Jha against his vendor was dismissed, the plaintiff (whose rights, we may observe, arose after that suit) is precluded from bringing the present suit under section 114, Act VIII of 1859.

The present suit is for possession, on the allegation of dispossession, on 19th January 1867, which is long after the decision passed in the case of the plaintiff's vendor, Baboo Lal Jha. The cause of action not being the same section 114 is clearly not applicable.

(2) *Before Mr. Justice Bayley and*

Mr. Justice Macpherson.

UMES CHANDRA ROY v. NABIN
CHANDRA MAZUMDAR.†

December 15th, 1868.

MACPHERSON, J.—The question in this

case is whether the present suit is barred by the decree made in a former suit, which was dismissed. The plaintiffs in the former suit were Haronath Roy, Radha Charan Roy, Chandra Kumar Roy, and Kali Prasanna Roy. The plaintiffs in the present suit are Umes Chandra Roy, Radha Charan Roy, and Chandra Kumar Roy. It appears to me that the former suit cannot be said to be between the same parties, or to have been brought by parties under whom the plaintiffs in the present case claim. Therefore, the present suit is not barred by section 2, Act VIII of 1859. Umes Chandra may or may not have stated in the course of the former suit that all the interest he had belonged to his father, Haronath Roy. But if he did make the statement, it will not alter the case so long as the parties to the two suits are not the same, and they are not the same, whether some of them are merely trustees for the others or not. I would therefore reverse the order of the lower Appellate Court, and remand the case to that Court, to be tried on the merits.

BAXLEY, J.—I concur.

(3) 3 W. R., 39.

(4) W. R., 1864, 320.

(5) *Id.*, 20.

(6) 1 W. R., 156.

(7) *Id.* 162.

(8) 7 W. R., 138.

* Special Appeal, No. 2247 of 1863, from a decision passed by the Additional Judge of Tirhoot, dated the 15th June 1868, reversing a decision of the Moonsiff of Tajpore, dated the 31st August 1867.

† Special Appeal, No. 928 of 1868, under Act X of 1859, from a decision passed by the Judge of Rajshahye, dated the 14th January 1869, reversing a decision of the Deputy Collector of that District, dated the 17th September 1867.

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ganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama
Natchiar (2), Srimati Sukhimani Dasi v. Mahendra Nath Dutt (3).*

MARKBY, J., after detailing the facts of the case, and observing that, upon the proceedings before the Court, there was "not the slightest trace of the suits (*viz.*, the suits decreed in favor of Bhawabal Sing on the 13th and 19th January 1864) having been compromised," and that the decision of the Subordinate Judge against Chatarbhuji, who had not appealed, was final, continued :—

The Subordinate Judge was clearly wrong in not raising the issue whether the plaintiff's suit was barred by the decrees of the 13th and 19th January 1864 respectively, and I am at a loss to understand why he did not do so. We, therefore, have raised it in the terms proposed ; and having heard the argument upon it, I think it ought to be decided in favor of the defendant Bhawabal Sing.

I wish to observe that the case now stands as a simple one between the plaintiff on the one hand, who seeks to have his title to this property declared, and the defendant, Bhawabal Sing, on the other, who denies that title. There is no relief prayed as against the defendant, Bhawabal Sing ; the plaintiff himself asserts that he has been up to this moment in full enjoyment of his rights, and the only relief prayed in this suit, as consequent upon the declaration, is that certain proceedings should be set aside, to which Bhawabal Sing was not a party.

The allegation that these proceedings were taken by the two defendants in collusion has been entirely abandoned.

Under these circumstances, there may be some doubt whether, under the rule which this Court has several times laid down that no declaratory suit can be maintained, unless some act has been done which would entitle the plaintiff to relief if asked for, this suit could be maintained at all. But this point has not been argued, and I do not place my decision on this ground. I point out the condition in which the question now stands before us, for the purpose of shewing that in this, as in all other cases, where the plaintiff, who has not been disturbed in his possession,

(1) 3 Mad. H. C., 320.

(3) 4 B. L. R., P. C., 16.

(2) 11 Moo's L. A., 50.

seeks for a declaration of his title, he must state clearly and precisely what that title is.

The argument on the part of the defendant is that we are bound, by the decree of January 1864, to hold that Bhawabal Sing was, at that date, as against the Raja, entitled to hold this property as his own; and that any title claimed by the Raja prior to the decree is, in fact, destroyed by the decree. He does not contend that, if the Raja claimed any title which accrued since the decrees, that the decrees would then be a bar; but he contends that they bar any claim to a title which accrued prior to the decrees. It is argued that, as between parties to a decree, there can be no inquiry as to who was the real plaintiff or the real defendant; that is, as between them, the decree is conclusive.

The plaintiff on the other hand denies that, except under sections 259 and 260 of the Code of Civil Procedure, there is any restriction whatever on the right of parties in this country to shew the real nature of benami transaction, and he contends that the rule, as to the conclusiveness of decrees, must be subject to the right of any of the parties to shew for whose benefit the suit was carried on.

It is on this point that our judgment chiefly turns. I think that there is no such general exception, as is contended for by the plaintiff, to the rule that a decree of Court is final and conclusive between the parties. It seems to me that it would lead to endless confusion if the defendant on the record could shew that, so far from being really a defendant, he was the plaintiff; that so far from judgment having been recovered against him, he had really recovered judgment. Not a single instance has been adduced before us of the benami system having been carried so far, and though it may be too late for this Court to abolish that pernicious system to the extent to which it is established, it is highly desirable not to introduce it where it is as yet unknown.

It is hardly necessary to observe that the case before us stands quite apart from those cases where a third person, who is not on the record at all, comes in to shew that a suit was carried on really for his benefit. It also stands apart from those cases

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where a person on the record seeks to shew that a suit was carried on really against a person who was not a party to the suit. This, though a highly inconvenient practice, has been very frequently allowed; and to such cases, the present decision does not apply.

Nor need we consider in this case the reasons why a person against whom an adverse decree has been obtained is allowed, in some cases, to shew cause why the decree should not be executed. No such question arises here.

What I hold is that a decree, until it is set aside, is, as between the parties to it, conclusive both as to the rights of those parties and the character in which they sue.

It follows from this that the decrees of January 1864 are a complete bar to the claim of the plaintiff to have declared a title by purchase in 1863, which is flatly inconsistent with those decrees.

It is clear, however, that the decrees would be no bar to a title which the plaintiff claimed as having accrued since those decrees were passed; and it is easy enough to see, if the plaintiff's case be a true one, how such a title might have been created. Not being, therefore, quite sure what the plaintiff's case really was, and not being desirous, even in appeal, to hold the plaintiff too strictly to the terms of his plaint, we enquired of Mr. Allan in the course of the argument if he relied on any new title acquired since the decree. He replied distinctly that he did not, but that he relied on the purchase in 1863, and the confirmation of that title by Bhawabal Sing's acts since the decree. It is clear, therefore, that the plaintiff, no doubt, for very good reasons, is desirous to carry back his title to the year 1863, and that is exactly what I think he is unable to do.

It is useless, therefore, to enquire further into the facts. I am of opinion that the decrees of January 1864 are a complete answer to the plaintiff's claim, and that the decision of the lower Court should be reversed on this ground, and the plaintiff's suit dismissed with costs.

We were very much pressed to go into the questions of fact raised and decided by the lower Court, and to decide them contingently on our decision being reversed by the Privy Coun-

sil. I am aware that that course has been recommended by the Privy Council in some cases, but I feel sure that their Lordships did not intend to take away our discretion in such cases, and I consider that there are in this case the strongest reasons for confining the discussion within the narrowest limits.

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BAYLEY, J.—I think we cannot go behind the decrees of January 1864, and that here the plaintiff's suit is barred. We are simply asked to reverse the position of the parties to the extent of giving a decree against the defendant, who has it in his favor, and to transpose it in favor of the plaintiff, who has no decree.

I concur in the order proposed.

On the 6th July 1870, the plaintiff applied for a review of the above judgments upon the following grounds, which were filed with the petition for review:—

1. According to several precedents of this Honorable Court, it has been distinctly ruled that the benami system being well known and recognized in this country, it is open to all persons claiming a beneficial interest in property to institute suits, for the purpose of showing that property purchased in the name of the person was so purchased with the money of another, who was the beneficial owner thereof. In the present suit, such evidence was early and fully adduced, but your Lordships, without any enquiry as to the merits in respect of the fact of benami, have determined that, in consequence of the decisions of 13th January 1864 and 19th January 1864, in which Bhawabal Sing, being a benamidar for the petitioner, had obtained a decree, such decree was final, and no enquiry as to the circumstances connected with that decree could be entered upon.

2. Your Lordships, by declining to look into the evidence as to the payment of consideration-money, undisturbed possession by petitioner for several years, and the express acknowledgment of Bhawabal Sing himself, made after the date of the decree obtained in his name, have shut out from consideration the admission of your petitioner's title so made by the said Bhawabal Sing after the said decree, which acknowledgment,

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your petitioner contends, has the effect of re-opening *in toto* the legal operation of the said decree whatever that may be, and establishing your petitioner's title as undisputed proprietor of the property in question.

3. The cause of action in the present suit, and the subject-matter thereof, and the issues to be tried, are wholly separate and distinct from the cause of action, subject-matter, and issues in the former suit. Section 2, Act VIII of 1859, does not apply.

4. In the former case, the suit was by Tiag Ali and Tilak Pattak against your petitioner, Debi Taranarayan, and others, the heirs of Jitan Lal, for a moiety of the property called mokurrari, of which the Maharaja was a purchaser of 4 annas. There is nothing, your petitioner submits, in law to prohibit your petitioner purchasing the former plaintiff's cause of action in respect of 8 annas, and securing the decree for the same in the name of his benamidar, at the same time giving up his right under his prior purchase at auction to the extent of 4 annas.

5. As your Lordships' judgment differs from other decisions of this Honorable Court, your petitioners pray that this case may be referred to a Full Bench for an authoritative ruling on the matter involved in this appeal.

6. Your petitioner was ready and willing, and offered to lay before your Lordships the oral and documentary evidence adduced by your petitioner, but your Lordships declined to look into the same, whereby your petitioner has not, he submits, had a full and proper investigation of his case accordingly to the ruling of their Lordships in the Privy Council.

Mr. Paul for the petitioner in review. [BAYLEY, J.—Before you commence your argument, I must observe that you were not in the appeal, and we cannot hear you in anything beyond or contrary to what was then advanced by Mr. Allan.] [MARKBY, J.—Mr. Allan argued that the decrees obtained in January 1864 were not *res judicata* between the parties. You are not entitled to re-argue that.] I am entitled to argue any point upon which the decision of the Court has been adverse to my client, and to show that the decision was wrong and contrary to justice. I must do this in my application for a review, for the pur-

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pose of showing why I ask for it. I shall not be entitled to a rehearing, until I have shown that there is a good and sufficient reason for granting me a review, and that it is requisite for the ends of justice. This, if I may be allowed, I am prepared to do upon the arguments of fact and law indicated in the written grounds of review which have been filed, and which I am entitled to urge now, whether they have been raised before, fully or partially, at the original hearing of the appeal, or whether they have not been raised at all. It may be, should my application be admitted, and a notice be directed to issue to the other side for them to appear at the rehearing of the case, that, at such rehearing, I shall repeat the same arguments as I desire now to lay before the Court.

When a motion is made for a rule *nisi*, the counsel who seeks the rule has to advance certain statements of fact and arguments on points of law showing the necessity for the rule. These arguments have to be repeated for the purpose of making the rule absolute, when the opposite party shows cause against it. To avoid such repetition of argument in cases of review, a practice has been commonly followed of issuing a notice to the opposite party, when the petition for review and written grounds are filed, and thus the arguments on the application for review, and the arguments for and against the review itself, are heard simultaneously. The application for review, and re-hearing on review, become one proceeding.

It is no ground (*first*) to prevent my showing why I ask for a review at all, or (*secondly*) for stopping my argument on the re-hearing in review, to say,—“these arguments were raised and “considered at the hearing of the appeal;” or to say,—“these “arguments were not then raised; in either case we will not hear “them now.” What third course can be adopted? If an argument has been raised on the hearing of the appeal, but has been misunderstood, or misapplied, or overruled by the Court, so that the justice of the case has been prejudiced (it lies on me to show this), I may put it in a clearer light, proving, if I can, that the Court is wrong on that point.

If a point has been passed over by the pleader, or by the Court, through inadvertence, or because it was, at the time,

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though unimportant, I may show that it is really of the greatest importance; and that, as affecting the justice of the case, it should be fully and carefully discussed. It was said in *Janab Ali v. Chandi Charan Dey* (1): "On the one hand a review is to be sought, not upon the same arguments upon the same matter and facts already placed before the Court, and upon which judgment has been given; and, on the other hand, a review should not be allowed upon altogether a new point which had not been taken at all at the time of the first hearing of the case, though full opportunity existed for doing so."

(1) *Before Mr. Justice Bayley and Mr. Justice Markby*

JANAB ALI (DECREE-HOLDER) v. CHANDI CHARAN DEY AND ANOTHER (JUDGMENT-DEBTORS).*

The 5th March 1869.

BAYLEY, J.—I am of opinion that this application for review must be rejected with costs.

A new point as to the jurisdiction of this Court has been raised on review, and it is urged that such a point can be taken at any time and in review.

I think the proper rule as to reviews is that, on the one hand, a review is to be sought, not upon the same arguments upon the same matter and fact already placed before the Court, and upon which judgment has been given; and, on the other hand, a review should not be allowed upon altogether a new point which had not been taken at all at the time of the first hearing of the case, though full opportunity existed for doing so. (Of course, I do not mean that a review might not be asked for on new evidence not before available, but such is not the plea here.)

As to the point of the jurisdiction now urged before us for the first time, it was (as admitted by the pleader) and laid before us at the first hearing, and we can-

not be said to have erred in our former judgment in respect of a point on which we never were asked to give judgment.

The other point taken is that re-consideration of the case might lead us to form a different view of the construction of the decree. I do not think, under the rule I have referred to as the proper one, that we ought to allow a re-hearing, because a repetition of the very same arguments which had failed in the first instance might succeed in the second. The principle would be utterly at variance with the finality of litigation required by law.

I would, therefore, reject this application with costs.

MARKBY, J.—I am of the same opinion. I think it is quite too late to take any objection as to jurisdiction in review after the Court has finally decided a case and come to a conclusion upon it. This disposes of the first objection.

As to the other objection, I quite agree with Mr. Justice Bayley that it ought not to be allowed to be taken. I think it is altogether an abuse of the right to ask for a review, and an unwarrantable waste of the time of Court which is the time of the public, to attempt to reargue a point which has been once considered and decided by the Court.

* Case No. 3 of 1869. Application for review of judgment passed by Mr. Justice Bayley and Mr. Justice Markby, on the 29th November 1868, in Miscellaneous Appeal, No. 394 of 1864.

I do not dispute the truth of the proposition put forward in *Prosunnonauth Dutt v. Judoo Nath Paul* (1) that "reviews are not granted merely to supply defects on the part of pleaders in their conduct of appeals." Judges, however, may be presumed to be generally acquainted with the law upon every material point in the case before them, and this entirely apart from what may be suggested to them by counsel. A Judge is competent to decide a case on any material point, even though such point has been but slightly pressed, or even passed over altogether in argument. The Advocate and the Judge may often take opposite views of the bearing and importance of some particular point. If any such material point has been passed over in the judgment of the Court, or the law relating to it has been misapplied, and if it is probable that a full or further consideration of the point will lead the Court to a different conclusion, the party who considers himself aggrieved by the judgment is entitled to argue it in review, whether it has been raised or not by the advocate or pleader in the original hearing of the appeal.

If the mere fact that some particular point has been previously discussed, or the fact that it has not been discussed, are equally good grounds for rejecting a review, then section 376 and the other sections of Act VIII of 1859 relating to reviews may as well be expunged.

The meaning of the word "review," as understood in Indian Courts, is clearly different from the technical meaning of the same word as understood in the Court of Chancery in England. A review is admitted in the Court of Chancery in England, for the correction of an error of law apparent in the decree, and not for the correction of an erroneous judgment or the questioning of the *ratio decidendi*: *Musleah v. Musleah* (2). In these Courts the word review has no such technical signification. Act VIII of 1859, section 376, enacts that "Any person considering himself aggrieved by a decree of a

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(1) 9 W. R., 589.

(2) 1 Boulnois, 58, and cases there-
in considered. See also *Perry v. Phelps*,
17 Ves., 178, where Lord Eldon distin-
guishes between a "review" and a "re-

hearing," which latter is more analogous
to what the learned counsel contends is
a "review," as understood by the Indian
Legislature.

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"Court, &c., and who from the discovery of new matter or evidence which was not within his knowledge; or could not be adduced by him at the time when the decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." In section 378, it is laid down that, "If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review."

In *Maharajah Moheshur Sing v. The Bengal Government* (1), the Privy Council, with reference to Regulation XXVI of 1814 section 4, clause 2, (2), relating to reviews of judgment, where precisely similar words are used, observed:—"It must be borne in mind that a review is perfectly distinct from an appeal; it is quite clear from the regulations that the primary intention of granting a review was the re-consideration of the same subject by the same Judge, as contradistinguished to an appeal; which is a hearing before another tribunal." The decision goes on to show that if, upon a consideration of the reasons stated in the petition of review, the circumstances of the case shall appear in justice to require it, the review is to be granted, and the same decision (page 309) impliedly holds that reasons impeaching the grounds of a judgment, or, in other words, matters whereby the *ratio decidendi* is questioned are admissible as grounds of review, provided that, if it should appear that the parties were cognizant of them at the time, any delay in pressing them shall first be accounted for.

(1) 7 Moore's I. A., 383; see 304.

(2) Reg. XXVI of 1814, sec. 4, cl. 2.—

"Any persons considering themselves aggrieved by a decree passed in a regular civil suit, or appeal by a Zilla, City, or Provincial Court, from which decree no further appeal may have been admitted by a superior Court, and who, from the discovery of new matter or evidence

"which was not within their knowledge, or could not be adduced by them at the time when the decree was passed or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against them are at liberty to present a petition for this purpose to the Court in which the decree in question may have been passed."

• It has been sometimes said by Judges of this Court that reviews can only be granted when there shall appear some "evident error" on the face of the judgment. The Legislature does not so limit the right to review, it expressly uses the words "or any other good and sufficient reason," "or otherwise requisite for the ends of justice" (1).

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It is not often that a judgment by any Judge of this Court discloses an "evident error" on the face of it; but the judgment may be nevertheless wrong (2).

In *Beebe Tokai Sherob v. Davod Mullick Furreadoon Beglar* (3), new points were allowed to be argued in appeal before the Privy Council; and in *Maha Rajah Dheeraj Raja Mahatab Chund Bahadoor v. The Government of Bengal* (4), an objection that the right of Government to sue was barred by limitation, was taken up for the first time in appeal before the Privy Council and allowed. If a point so material to the case can be taken up for the first time at the very latest stage in appealable cases *a fortiori* can they be taken up in review, the object of which is to save the parties the expense of an appeal, and, if possible, stop further litigation. [BAYLEY, J.—In review it must be shown that we are wrong upon the facts and statements put before us at the original hearing of the appeal.] That is what I propose to do; but any new point may be raised in review, so as it does not work an injustice. Any "good and sufficient reason," "requisite for the ends of justice," may be put forward. Here, however, to speak strictly, I do not seek to raise any "new" point. I seek to argue a point which has always existed in the case, and which necessarily goes to the very root of it, although its importance may not have been fully pressed upon the Court, or considered in the judgment. It is no "new" point which has arisen since your Lordships' judgment was delivered. I wish to press Mr. Allan's argument upon the Court, and other

(1) See Act VIII of 1859, s. 370, and Act XXIII of 1861, s. 11.

(3) 6 Moore's I. A., 510.

(4) 4 *Id.*, 466.

(3) See *Nadior Chand Roy v. Baikant Nath Misser*, 4 B. L. R., A. C. 33, foot note.

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arguments to the same end, which will tend to show your Lordships' decision to be erroneous, and to quote several authorities which have not been put before the Court or considered.

Every Court of Justice is entitled to re-consider its judgment apart from regulations and law. But here the Legislature expressly provides for such re-consideration. The Judges are, therefore, bound to obey the Legislature, and to review their judgments whenever there is reasonable ground for saying that the justice of the case requires it. The effect of the decisions is practically to repeal the review sections of Act VIII of 1859.

If reviews are not to be granted, either upon points which have been taken during the argument of the appeal, nor upon points which have not been so taken, it follows that a review can only be granted for the purpose of correcting an error evident on the face of the judgment or decree. This object could, it is submitted, be more properly and easily attained by calling the Court's attention to the error by motion, than by the more tedious and expensive process of a review. Such has been the practice in some cases,

If reviews of every description, with the exception of those in which self-evident error or omission is suggested, are to be disregarded and summarily dismissed, the inevitable result will be that appeals to the Privy Council must increase. I have to submit that the right of such re-consideration as I desire to support is a privilege enjoyed by the Court for the purpose of rectifying an erroneous judgment, which might have been passed; and I have further to submit that the restriction which the High Court have in some instances put upon their power to review judgments, is a surrendering of their privilege.

MARKBY, J.—The question raised for our decision on this application is one on which I believe nearly all the Judges of the Court have expressed their opinions. It is whether on unsuccessful party can come up in review, and claim as of

right to be heard to argue that the conclusions arrived at by the Court at the hearing are erroneous. I consider it to be a settled rule of practice in this Court that no such right can be claimed. We heard the case to which this application relates argued at very considerable length, and we took time to consider our judgment. The result was that the plaintiff's suit was dismissed.

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The plaintiff now claims, as a matter of right, to be heard to argue that the grounds of our decision were wrong.

It was contended, on behalf of the plaintiff, that this was contemplated by Act VIII of 1859. The contrary appears to me to be the case. The sections which relate to proceedings in review provide, first, by section 376, for the application for a review ; secondly, by section 378, for a notice to the opposite party, and a hearing in order to discuss whether the application for a review ought to be granted ; thirdly, under section 380, for a re-hearing if the review is granted.

Now it is clear that the proceedings under section 376 and section 378, and under section 380, are perfectly distinct, the first is in order to consider whether the case should or should not be re-heard ; the second is the re-hearing.

But the right which the plaintiff now claims would wholly expunge the first of these proceedings ; what the plaintiff's counsel really now claims is at once to have the case re-heard ; he wishes at once to produce his arguments to show that our decision was wrong ; he has not stated in his application, or suggested a single reason of any sort or description why the hearing was not full, and complete, and final ; but simply states the several grounds on which he wishes to contest our decision. In my opinion to permit this would be to give an unsuccessful party the privilege of a re-hearing, without the preliminary requirement being satisfied, namely, that he should show some good and sufficient reason why he should be re-heard.

This view of the law which seems to me to follow from the plain language of the Act, has possibly been lost sight of from the three stages of the proceedings above-mentioned very often taking place at one sitting of the Court. We have found it more convenient when an application for review is filed that

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notice should at once be given to the vakeel of the opposite party under section 878, so as to bring both parties before the Court, when the review is first applied for. And when both parties are before the Court, if the Court thinks that the application for review should be granted, it is very often found convenient at once to re-hear the case. But it was never intended thereby to make the re-hearing of a case a matter of right.

I think the plaintiff, before he can be heard to argue that our decision was wrong, must satisfy us that there is some good and sufficient cause why we should grant him the privilege. Until he has done so, I think we are bound to retreat our former judgment as final.

BAYLEY, J.—I think the plea of the plaintiff untenable, and that the application for review should not be granted.

The provisions of the law as to the application for review are one distinct matter. To re-hear after the success of that application is another matter. But the plaintiff's counsel argues that he is entitled to a re-hearing of his case on any good and sufficient ground, even if such grounds were never urged in any Court below, or even here; that is, the Court is, asked to say it is in error in its adjudication when it never had before it in the first instance the new points on which it is asked subsequently to adjudicate.

I adhere then to the almost concurrent decisions of this Court which construe the sections 376 to 378 not to allow of a re-hearing upon the possibility of an alteration of opinion upon new points being put, and new arguments urged, after the decision, by another advocate not present at the first hearing. (1)

(1) A similar application was made by Mr. Paul, on 25th July 1870, in *Gangapersad v. The Agra and Masterman's Bank*. Reg. App., 283 of 1869.

that a point previously argued cannot be argued in review. It is quite clear that we considered the matter of costs and the circumstances before, and we cannot allow the same point to be argued again in review.

COUCH, C. J.—I have ruled for years

• *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice L. S. Jackson.*

SHAHAZADI HAJRA BEGUM v.
KHAJA HOSSEIN ALI KHAN.*

The 7th April 1870.

Mr. Woodroffe applied for a review of the judgment given in this case on appeal under the 15th Section of the Letters Patent (1). He showed that Mr. Justice Kemp had not correctly stated the point in contention, the point really involved, and which was really argued before the Division Bench, being whether the sale of the appropriated property and its conversion into money, for want of assets to pay off the mortgage, rendered the *wuqf* void, and also contended that money, which in this case was the surplus proceeds of the sale of the talook in the hands of the Collector, could not be the subject of "*wuqf*," (Baillie's Digest of Mahomedan Law, p. 562.)

PEACOCK, C. J. raised no objection to the hearing of these arguments, although the first had been argued before in appeal, and the second had not, but simply delivered a judgment supporting the previous decision. He said:—

"Even if the talook had been sold under the mortgage, it appears to me that the heirs at law would not be entitled to the surplus proceeds.

"The talook was sold under Regulation VIII of 1819 for the purpose of realizing rent due for it.

The sale did not take place under the Mahomedan law, and it appears to me that, when the mortgage was satisfied out of the surplus proceeds of the sale, the remainder of the surplus proceeds belonged to the *matwalli* under the endowment. The plaintiff's mortgage was paid off out of the surplus proceeds, which were realized for the arrears of rent, and it

appears to me that the surplus did not belong to the heirs-at-law of the endower, but to the person who, but for the "sale for arrears of rent, would be entitled to it. For these reasons I think this application should be rejected with costs."

JACKSON, J., concurred in rejecting the application for review. In the course of his judgment, he observed:—"I also think, whether the real point in the case was correctly stated by the Division Bench or not, that it is quite clear that the other points on which the appropriation of the "*wuqf*" was impugned were not argued or brought before the learned Judges, and that those points must consequently be excluded from our consideration in this review. I desire only to add that, in hearing the argument of the learned counsel to-day, on a point which was fully argued before us, on which we pronounced our deliberate opinion, I in no way resile from the opinion which I recently expressed in a case of review which was decided by me and Mr. Justice Markby; for in the first place, there are one or two points of difficulty which in my opinion made it desirable that argument should be heard; and in the next place, I have not thought it convenient to raise before the Court, constituted, as it now is, a point of some difficulty and importance unquestionably, and on which the learned Chief Justice has not hitherto expressed a decided opinion."

Before Mr. Justice Phear and Mr. Justice Mitter.

THE COLLECTOR OF TIPPERRA (DEFENDANT) v. MUSSAMAT MAFIZUN-
NISSA BIBI AND ANOTHER

(PLAINTIFFS).†

The 29th June 1870.

Baboo Anukul Chandra Mookerjee applied for a review of the judgment

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HOSSEIN ALI
KHAN.

* Application for Review in Appeal 8 of 1869, under section 15 of the Letters Patent.
† Applications for Review, Nos. 45 and 46 of 1870, against the judgments of Mr. Justice Phear and Mr. Justice Mitter, passed on the 14th February 1870 in Special Appeals, Nos. 2588 and 2589 of 1869.

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passed by the Court on the 14th February 1870 (1), and contended that the suit was not cognizable by the Small Cause Court, and cited *Rambuz Chittangeo v. Modoo Soodun Pal and Sreepatty Roy* (2). It was neither a suit for damages contemplated in section 6, Act X of 1865, nor was the suit brought on an implied contract; besides, the heirs of the Nazir have brought different suits for recovery of the amount paid by each of them individually. The valuation therefore of the present suit has fallen short of rupees 500. But, had the whole amount paid by the heirs been taken collectively, that is, the total amount due from the Nazir, been the subject-matter of a single suit, it would have exceeded rupees 500. The cause of action of these several suits is one, and therefore the Small Cause Court has no jurisdiction.

PHEAR, J.—I think that this application for review ought to be rejected, because it appears to me that no matter is now brought to our notice for the purpose of inducing us to alter our view which might not have been brought before us, and fully argued and discussed, when the appeal was heard.

I desire to express no opinion whatever as to what bearing the authority to which Baboo Anukul referred might have upon the point of law which was involved in the judgment passed by this Bench on special appeal.

MITTAL, J.—I am not prepared to say that the ground taken by the petitioner is not a proper ground for review of judgment, if it is otherwise valid. Whether the Full Bench decision, referred to by the petitioner was cited before us at the first hearing or not, does not appear to me to be very material.

The Court was in my opinion bound to administer the law as it was, whether the pleaders who argued the case on that occasion had pointed out that decision or not.

I express no opinion as to whether the

decision referred to by the petitioner is applicable to this case or not; I should like to hear further argument on that point. But if that decision has any application to the present case, it was the duty of the Court to take notice of it, whether it was referred to or not by the pleader who argued the case on the first occasion.

Baboo Anukul Chandra Mookerjee was heard upon the merits of the case.

Moulvi Marhamat Hossein (Baboo Hari Mohan Chuckerbutty with him) for the respondent was not called upon.

PHEAR, J.—As my learned colleague intimated a desire to hear further argument from the petitioner, Baboo Anukul has addressed us on the merits of the application for review; and after hearing him upon the merits, I have only to remark that I have nothing further to add to the observations which I have already made. I am of opinion that the present application must be rejected with costs.

MITTAL, J.—Having now heard the pleader for the petitioner upon the merits of this application, I am of opinion that this suit was a suit for damages within the meaning of section 6, Act XI of 1865. The lower appellate Court has distinctly found that the payment was not a voluntary payment; and as the facts on which this finding has been arrived at cannot be disputed, I have no doubt in my mind that this was a suit for damages. The fact that the plaint did not expressly state that the plaintiff was suing for damages does not make any difference.

Before Mr. Justice Bayley and Justice
Sir C. P. Hobhouse, Bart.

GARIB HOSSEIN CHOWDHRY AND
OTHERS (DEFENDANTS) v. WISE
(PLAINTIFFS). *

The 14th July, 1870,

THE plaintiff, having bought up decrees against the first defendant's deceased

* Review, No. 79 of 1870, from the judgment of Mr. Justice Bayley and Justice Sir C. P. Hobhouse, Bart., passed in a Regular Appeal, No. 178 of 1869, dated the 8th March 1870.

(1) 4 B. L. R., App., 46.

(2) Reference from the Small Cause Court Kishnaghur, 15th April 1867.

father, sued to have the property of the deceased father sold in satisfaction of the plaintiff's decree. The property consisted of five parcels. The answer was that these properties had, since the father's death, been sold in execution, and bought by the other defendants. The plaintiff replied that the other defendants were merely the benamis of the father's son and heir, the first defendant, and that he it was who had bought in the properties at each execution sale.

The lower Court found that the other defendants were not the first defendant's benamis, but *bona fide* purchasers at the several execution sales.

On appeal the High Court, BAYLEY and HOBHOUSE, JJ., held on the facts that the first defendant was the real purchaser, and ordered the properties to be sold, in satisfaction of the plaintiff's decree.

Mr. Money, on behalf of two of the defendants who were purchasers of two of the lots, applied for review of the judgment as to those lots, on the ground that the debts for which the lots had before been sold in execution was also a decree against the deceased father, and that therefore these assets, having been already once exhausted in sale for the deceased's debts, were not liable to be sold again, in satisfaction of further debts of deceased, and that whether bought really by the son or by the other defendants, unless it were proved that the purchase by the son was made out of other assets of the deceased father.

Mr. Money contended that, as to these two parcels, the order for a resale was an erroneous legal conclusion from the High Court's own premises, however rightly that conclusion might flow from those premises as to the other parcels which had been previously sold, not for the dead father's debt, but for the son's debt, after the father's death.

BAYLEY and HOBHOUSE, JJ., were for refusing to allow the argument to proceed,

(1) *Ante*, p. 321.

on the ground of the decision in *Bhawabal Sing v. Maharajah Rajendra Pratap Sahoy Bohadhr* (1), and because this point had not been taken in the argument on appeal.

Mr. Money contended that this case did not come within even the exhaustive grounds ruled in the case referred to for refusing the review, as it was neither a point raised before, or not raised before, neither an argument already urged and decided, nor an argument failed to be raised at the appeal; that the appeal was on facts, and the question was whether the purchases were made by the son or by the other defendants; that, according to the finding of fact, certain legal consequences should flow therefrom different as to the different parcels; that at the argument on the appeal, it was to be assumed that, however they found the facts, the Court would draw the proper legal conclusion from those facts; and that therefore he now proposed to argue only the inaccuracy of the conclusion drawn, as to these two parcels from the Court's own finding of fact, and which error first came into existence after the argument on the appeal, viz, when the judgment on appeal was given. The Court however refused to allow Mr. Money to proceed, and gave judgment as follows:--

HOBHOUSE, J.—We think, after the best consideration that we can give to the arguments of the learned counsel for the petitioner for review, that there are only three points which call for any notice on our part: the *first* is whether there is any error or not in our not coming to a decision on the question of the collusiveness of certain decrees; the *second* is as regards the multifariousness of the suit; and the *third* is with reference to the decision of the 17th January 1868. I understand the learned counsel for the applicant for review to say that, if we had found that the decree of one Dilwar Hossein was a true decree, then we should have been obliged to find that, so far as his client is concerned, the

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plaintiff had no cause of action. I really do not know whether this would have been the case or not; and in order to determine, first of all, whether the decree was a true or fictitious decree, and if it was a true decree, whether the plaintiff had any cause of action or not, it would, it seems to me, be necessary to go into the whole case again, re-consider the evidence in the case, and re-hear the counsel for the opposite party.

Now, on returning to the judgment which we gave, I find that the pleaders who were then instructed by the defendants made one common issue on which they elected that we should determine, either for the plaintiff or for the defendants, and that issue is thus recorded.

I state in my judgment, after referring to certain admissions made, that "it is further not denied that, if the said Garib Hossein is found to be the person at present beneficially interested in those properties, and in the possession and enjoyment of them, then he, as the possessor, is bound to the extent of the properties to satisfy the decrees against Joki Chowdhry." So that it seems to me that the parties elected that we should determine the case on a question of fact, and that that question should be one altogether independent of that now raised before us. The parties were then at liberty to raise the question which the learned counsel now contends for; and if they did not do so, they have only themselves and their advisers to thank for it; and in my judgment, an application for review is not the proper place where we can come to a trial and determination of a question which was not raised in the appeal provided for by the law, and which requires us to go into the whole evidence once again. For these reasons I do not think that we ought now to allow the parties to raise the question which the learned counsel would now raise.

In the matter of multifariousness, that is a question which was fully argued at the first hearing, and all that the learned counsel now asks us to do is that we

should hear it once again. Possibly we should hear from him arguments, not those which were urged at that time, but certain others which he is prepared to advance on that particular question; but here again I agree with a number of the Judges of this Court who have held that an application for review is not the place where we should have a re-argument of what has been already argued. If that were so, the Legislature, instead of providing for review on the narrow grounds expressed in the law, would have provided that every case which has once been heard in the way provided by the laws should be entitled to a second hearing.

In the matter of the decree of the 17th January 1868, I think we went too far when we said that it was no evidence at all against the plaintiff; but at the same time, I do not think that it is conclusive on the point which was in issue before us and I am quite clear therefore that that decree, standing alone, should not induce us to alter our judgment on the facts found.

The other grounds which the learned counsel would take are, in my judgment (although the learned counsel does not think it to be so), determined by the decision which we have originally passed in the case.

I would reject this application with costs.

BAYLEY, J.—I quite concur with Mr. Justice Hobhouse who has delivered the judgment of the Court in this case.

As to the admission of new arguments after a decision has been given in the case upon points, the very same as were previously put before the Court, I have already expressed my opinion in review No. 42, decided on the 6th July last by Mr. Justice Markby and myself (1).

In regard to the manner in which this case has been placed before us, I would state that the pleaders argued the case, as on the merits upon the one point only *viz.*, whether Garib Hossein Chowdhry was really the beneficial owner of the property in suit; and after carefully hear-

ing the evidence, as it was read by counsel, and argued upon by the pleaders on both sides, we came to the conclusion of fact that Garib Hossein was such beneficial owner,

The point of multifariousness had been previously raised and disposed of, and cannot, I think, be re-argued on a new footing by a new counsel.

I agree in rejecting this application with costs.

Before Mr. Justice L. S. Jackson and
Mr. Justice Markby

BENI MADHAB GHOSE (PETITIONER)
v. GANGA GABIND MANDAL (OPPOSITE PARTY).*

The 20th December 1869.

Mr. Paul for petitioner.

Mr. R. T. Allan for opposite party.

JACKSON, J.—The question that we have to consider in the present application is one which we have often considered before, and upon which I for my part have, and as I understand most of the other Judges also have, expressed a decided opinion. It is, whether in a case, an appeal having been carefully considered by this Court on a point of law argued at length, and the Court having come to a deliberate conclusion on that point, the party dissatisfied with the judgment of this Court, has an absolute right to be heard by fresh counsel in an application for review, merely for the purpose of convincing the Court that its first opinion upon that point of law was erroneous.

Mr. Paul contends that a party has such right, and declares that such right is perfectly clear. I can only say that it appears to me to be quite clear the other way. Rights of parties and the duty of the Court, in dealing with petitions of reviews must be gathered, if

anywhere, from sections 376 and 378 of the Procedure Code (*reads*).

It seems to me clear that the only case in which the Court is bound to grant a review is where "it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice."

Mr. Paul contends that his object in this case is to correct an evident error in law, in the judgment of the Court. It is necessary therefore to consider what can be called an evident error. Can it be said that an error which is capable of being established by a lengthened argument upon a point which admits of two opinions is an evident error? I think not.

It appears to me that the word evident is used in the same sense as it is in a passage to which the Chief Justice (whom I have just had the advantage of being able to consult) has referred me in the second volume of Maddock's Chancery Practice, page 484, title "Re-hearing," I think the word evident means merely that which is manifest, patent, or obvious, and it is only where the Court has fallen into an error of that description that it is bound to grant a review.

Mr. Paul refers us to a ruling of PEACOCK, C. J. and MITCHELL, J., in *Koh Poh v. Moung Tay* (1) on a reference from the Recorder of Rangoon. In that case the Recorder, after stating the nature of the case in which the point arose, says:—"It seems to me that the ground set forth by Mr. Agabeg is a ground for an appeal, instead of a ground for review, and I find that the Chief Justice, in the case of *Nusseeroodeen Khan v. Inder Narain Chowdhry* (2), held that the fact of the Court below having decided against the weight of evidence is a ground for appeal, and not for review, and His Lordship goes on to say (see page 149)

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* Application for Review, No. 225 of 1869, against the judgment of Mr. Justice L. S. Jackson and Mr. Justice Markby in Special Appeal, No. 2687 of 1868.

(1) 10 W. R., 143.

(2) 1 Ind. Jur., N. S., 147.

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"that the attempt has frequently been made for the purpose of having the case re-argued by fresh counsel, when parties have been dissatisfied with the first decision.

"I would therefore request the opinion of the High Court, whether an error in a point of law is a ground for review of judgment."

On that the Chief Justice was of opinion "that an error on a point of law is a ground for a review of judgment."

In consequence of this case being cited in argument, I have thought it right to consult the Chief Justice, in order to learn whether he intended to go so far as these words might be held to imply. The result of that communication is that I believe myself authorized to state that what the Chief Justice really intended to say on that occasion was not that an applicant for review was entitled to a fresh argument on a point of law; but that if the Judge should be satisfied that he had committed an error in law, so that his own conscience should prompt, and as it were compel, him to rectify such error, it would be quite in accordance with the Procedure Code that he should do so, and in this I fully agree.

Mr. Paul says if this be the correct view, sections 376 to 378 may as well be struck out of the Code. I think not, and I believe those sections capable of doing

very useful service. But I may observe that, if parties had a right to re-argue the same points over and over again (for they are not limited to a single application), it would be simply impossible to carry on the business of the Courts, and I am sure the Legislature never contemplated any such thing.

I must therefore decline to admit the right claimed by Mr. Paul of re-arguing this case for the purpose of convincing us that the conclusion at which we deliberately arrived on a point of law, was not the conclusion at which we ought to have arrived.

There is, however, a manifest error in the decree in this case relating to the quantity of land which might very well have been set right in simple routine, but which I think ought to be corrected and that correction, as pointed out, may accordingly be made, but without costs.

MARKBY, J.—I am of the same opinion. I think it quite clear that no person has a right to call upon the Court to hear a fresh argument upon a question which has been already submitted to it, and which it has determined. Were it otherwise, litigation would be absolutely interminable; and though the language of this part of the Code might have been more clear and precise, I am quite sure this was never intended.

[FULL BENCH.]

Before Sir Richard Couch, Kt Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Phedr, and Mr. Justice Mitter.

ABHAYCHANDRA ROY CHOWDHRY (DEFENDANT) v. PYARIMOHAN GUHO AND ANOTHER (PLAINTIFFS).*

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May 16.

Hindu Law—Karta—Managing Member—Liability of a Managing Member to Account.

See also
14 B.L.R. 36.

A managing member of a joint Hindu family is bound to render an account of his management to his co-sharers, and he is liable to a suit if he refuses to do so.

And such suit will lie even if the parties suing were minors during the period for which the account is asked

THIS was a suit for recovery of a one-third share of the annual profits from the commencement of 1270 (April 1863) up to Asar 1273 (June 1866) of the joint real and personal property of the plaintiffs and defendant.

The plaint stated that, on the death of the plaintiff's father Kulachandra, in Falgun 1269 (February 1863), their paternal uncle, Abhaychandra, undertook the management of the household and real and personal property of the joint undivided family; that, although the profits of the estate were large, yet the plaintiffs had not been properly maintained; that the plaintiff Nagarchandra, in Asar 1273 (June 1866), had taken the management of the one-third share belonging to himself and his minor brother. The plaintiffs prayed for recovery of a one-third share of the profits in the hands of the defendant from the time he assumed the management of the real property to the time the plaintiff, Nagarchandra, took upon himself the management thereof, and also for a one-third share of the personal property.

The defendant, Abhaychandra, denied that he had undertaken the management of his brother's estate; and he stated that there was separation in 1256 (1849), when the personal property had been divided between the plaintiffs' father and the defendant;

* Special Appeal, No, 1231 of 1869, from a decree of the Officiating Additional Judge of Backergunge, dated the 6th March 1869, modifying a decree of the Principal Sudder Ameen of that district, dated the 26th June 1867.

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that, since the separation, Kulachandra messed and lived apart from him, and that the amount recovered by him from the debtors was an account of separate advances made by him, and not on account of advances jointly made.

The Subordinate Judge found that the defendant, Abhaychandra, had the management of the whole property and household after Kulachandra's death ; that the family messed separately ; that Abhaychandra allowed the plaintiffs only the bare necessities of life ; and that there had been no division of the real and personal property.

He passed a decree in favor of the plaintiffs for the profits of the real and personal property.

On appeal, the Judge held that *Chuckunlall Singh v. Poran Chander Singh* (1) did not apply, and that the income tax returns which had been filed by defendant, in respect of the joint property were conclusive against the defendant, as no evidence had been adduced to rebut their correctness. He, accordingly, dismissed the appeal, but passed a decree in favor to the plaintiffs for rupees 2,505-3-8, after deducting the necessary expenses.

The defendant, Abhaychandra, appealed to the High Court on (*inter alia*) the following grounds :

1. That the suit cannot proceed against your petitioner, inasmuch as there is no privity of contract between him and the plaintiffs, and the plaint itself does not disclose any sufficient cause of action against him.

2. That the plaintiffs cannot succeed in this case, until it is shewn that your petitioner was their trustee or agent, and in that capacity collected their share of the profits, and appropriated them to his own use.

The case was argued before a Division Bench, and for the appellant—*S. M. Ranganmani Dasi v. Kasinath Dutt* (2) was relied on. But the learned Judges (LOCH and MITTER, JJ.), dissenting from the doctrine expressed in that case, referred the following question for the opinion of a Full Bench :—

1st.—Whether the managing member of a joint Hindu family

(1) 9 W. R., 483.

(2) 3 B. L. R., Q. C., 1.

can be sued by the other members for an account, and (it appearing that one of the plaintiffs was a minor) ;

2nd.—Whether such a suit would not lie, even if the parties suing were minors during the period for which the accounts were asked.

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The reference was made with the following remarks by

MITTER, J.—The first point raised in this special appeal is that the managing member of a joint undivided Hindu family is not liable to be sued by the other members for an account. I am of opinion that this contention is not valid. It is true that the position of the managing member of a joint Hindu family is, in many respects, different from that of the managing member of an ordinary partnership concern. But the former is not without his responsibilities. He is entitled to obtain credit from his co-parceners for all sums of money *bonâ fide* spent by him for the benefit of the joint family ; but he is certainly liable to make good to them their shares of all sums which he has actually misappropriated, or which he has spent for purposes other than those in which the joint family was interested. Of course, no member of a joint Hindu family is liable to his co-parceners for anything which might have been actually consumed by him in consequence of his having a larger family to support, or of his being subject to greater expenses than the others ; but this is simply because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus, for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of those daughters to a suitable bridegroom is an obligation incumbent upon the whole family so long as it continues to be joint, and the expenses incurred on account of such marriage must be necessarily borne by all the members without any reference whatever to respective interests in the family estate. The rule would be quite different, it is true, in the case of a partnership concern, every member of which is liable to the others for every pice which he has spent over and above his legitimate share in the business. But this distinction, while it goes to create a material difference in the

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principle, according to which the accounts are to be adjusted in the two cases, does not constitute any ground whatever for holding that the managing member of a joint Hindu family is not bound to render an account of his managership to the other members if they choose to insist upon it. Suppose, for instance, that one of the members of a joint family, with a view to separate from the others, asks the manager what portion of the family income has been actually saved by him during the period of his managership. If the manager chooses to say that nothing has been saved, but at the same time refuses to give any account of the receipts and disbursements, which were entirely under his control, how is the member, who is desirous of separation, to know what funds are actually available for partition? And according to what principle of law and justice can it be said that he is bound to accept the *ipse dixit* of the manager as a correct representation of the actual state of things? The amount of confidence which is invariably reposed in the manager by the other members of a joint Hindu family, so long as there is peace and harmony in it, is well known to those who have any practical knowledge of such families; and if the contention of the pleader for the special appellant is correct, all that I can say is that the sooner such families come to an end the better.

That the manager of a joint Hindu family is not entitled to obtain any credit for expenses other than those that are required for the benefit of that family appears to me to be clear from the following text of Katyana, which is quoted in page 91, volume 4, Colebrooke's Digest:

"What has been given away for the religious purposes of one individual, a friendly gift and a loan made on his own account shall, if discovered, become part of his allotment, for the patrimony cannot be alienated by one parcener on his separate account."

Then, again, in page 97 of the 4th volume of the same work, the author, Jagannatha Tarkopanchanana, makes the following remark; and he adds that it is approved of by Raghunandana also:—

"When some cause is shown for suspecting that effects are concealed, then only shall ordeal be performed. For example,

"the income is great, and expenditure small, but he who superintends the receipts and disbursements does not satisfactorily account for them."

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The passage in italics clearly goes to show that the manager of a joint Hindu family is liable to give an account of his management to the other members of that family. The pleader for the special appellant, however, has referred me to two cases ; one is *Chuckunlall Singh v. Poran Chmnder Singh* (1) ; the other is *S. M. Ranganmani Dasi v. Kasinath Dutt* (2). With reference to the first of these cases, I wish to observe that it is not exactly in point. The learned Judges, by whom it was decided, appear to have laid considerable stress upon the position of a *karta*, with reference to the adult members of a joint undivided Hindu family ; and although I am by no means prepared to hold that there is any analogy between the *karta* of a joint Hindu family and the chairman of a committee, it seems to be clear that there was no evidence given in that case to prove that the *karta* had the exclusive management of the family estate. The second case, however, is directly in support of the appellant's contention ; but with the utmost deference to the learned Judge by whom it was decided, I am bound to say that I entirely differ from the opinion which he has laid down ; and I would, therefore, refer the following questions to a Full Bench of this Court, namely, *first*, whether the managing member of a joint Hindu family can be sued by the other members for account ; *secondly*, whether such a suit would not lie even if the parties suing were minors during the period for which the accounts are asked.

LOCH, J.—I concur.

Baboo *Khettra Mohan Mookerjee* and *Chandra Madhab Ghose*, for the appellant, contended that an agent or a master only could be called upon for an account ; but a managing member of a joint Hindu family was neither an agent of the other members nor their trustee. There could be no separate right in each individual member of an undivided family ; all the members

(1) 2 W. R., 483.

(2) 3 B. L. R., O. C., 1.

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enjoy the property as one—1 Strange, 199. Separate rights could only commence after partition. The managing member took no appointment, but as a matter incidental to the Hindu family. The management is taken merely from motives of affection or duty. There was neither express nor implied trust. Trust could not be presumed—2 Story, section 1195. The position of a managing member is analogous to that of a father to his sons. The authority and obligation of an eldest brother, as laid down in the Hindu shastras, are like those of a father—3 Colebrooke's Digest, verses 9—12, page 159. Under the law he is bound to take the management. In the same way, a son cannot call on his father for an account, even when the son brings into the joint stock, property acquired by his skill and valor, because the father is the master, and the sons have no independence—3 Colebrooke, verses 7 and 8, page 27. Similarly the managing member who holds the same portion in a Hindu family could not be called upon for an account. The constitution of joint Hindu families would fall, for no one would willingly render himself liable to account. Verses 91 and 97, 4 Colebrooke's Digest, are not texts, but opinions only of Jagannatha. They have no reference to the case of a managing member. Effects discovered after partition are to be divided—4 Colebrooke, pages 97 to 100. Secretion of such property was not considered a theft; it could only be a moral offence—4 Colebrooke, pages 92 and 98 to 100. No violence could be used—Vayavastha Darpana, page 540. The same argument will hold as to a minor.

Baboo *Srinath Das* and *Girijasankar Mazumdar* for the respondent were not called upon.

The judgments of the Full Bench were delivered as follows:—

Couch, C. J.—The first question in this case is whether the managing member of a joint Hindu family can be sued by the other members for an account. Now the members of a joint Hindu family are entitled to the family property, subject to such dispositions of it, as the managing member is entitled to make, either by virtue of the power which is given to him by law as

manager, or of the powers that may be given to him by the consent of the other members of the family. Subject to the exercise of these powers, and to any disposition of any portion of the family property which may have been made by virtue of them, the other members of the family are clearly interested in that property. It appears to me that the principle upon which the right to call for an account rests is not, as has been supposed, the existence of a direct agency or of a partnership, where the managing partner may be considered as the agent for his co-partners. It depends upon the right which the members of a joint Hindu family have to a share of the property ; and where there is a joint interest in the property, and one party receives all the profits, he is bound to account to the other parties, who have an interest in it, for the profits of their respective shares, after making such deductions as he may have the right to make. That appears to me to be the right principle, and it is the principle upon which the English Courts of Equity act in the case of joint tenants and tenants in common, and not merely in cases of partners. I think, with due deference for Mr Justice Markby's judgment, that he has put the right upon rather narrow grounds, and has not taken precisely a correct view of the grounds upon which it rests. It is also to be observed that his opinion, which is opposed to there being a right to a suit for an account, was not necessary for the decision of the case before him, and was so far an extra judicial opinion, for he did, under the circumstances of the case, decree an account. His opinion is, therefore, not entitled to the same weight, as if it had been a direct decision in the suit upon a point in question.

Then, as regards the judgment in the other case, it appears to me that it is not at variance with the proposition that a suit may be brought for an account. Mr Justice Phear can better explain what he intended in his judgment in that case, but I certainly do not understand him to have laid down that there could not be a right to an account as against the managing member of a joint Hindu family. I think, therefore, that, if we look to the principle upon which Courts of Equity act in these cases, the principle upon which the right to an account is founded, this case comes within it ; and then when I find that there has

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been a long course of practice, allowing these suits to be brought certainly I should be extremely reluctant now to hold that such a suit cannot be brought, or to come to the conclusion that our allowing such a suit to be brought would, as has been urged, be destructive to the existence of joint Hindu families. I am not satisfied that it is so, and indeed I cannot see how it can be destructive to the existence of joint Hindu families, that the manager should be bound in equity and good conscience to account for his management, and should be liable to a suit if he does not do so. I would, therefore, answer the first question in the affirmative ; and that being so answered, the other question must also be answered in the same manner. With regard to that, the opinion of Mr Justice Phear is directly in point that a suit can be brought for an account in the case of a minor. He has expressly so stated in his judgment, and the opinion of Mr Justice Markby to the contrary is only an extra judicial opinion. It is entitled to weight, and that was probably the reason for this case being referred, but it is not entitled to the same weight as if it had been an opinion which was necessary for the decision of the case.

With these answers, the case will go back to the Division Bench for a decision on the remaining questions arising on the appeal.

KEMP, J.—I concur in this judgment.

JACKSON, J.—I am of the same opinion.

PHEAR, J.—As the judgment of mine in *Chuckunlall Singh v. Poran Chunder Singh* (1) has been considered in some degree to afford a reason for this reference, I wish to say a few words explanatory of it, while I state that I entirely agree with the Chief Justice in the answers which he proposes to give to these questions.

Until I came into Court to-day, I had not the slightest idea that anything which I said in the case to which I have just re-

ferred could be interpreted into an opinion on my part that the managing member of a joint Hindu family could not be called to account by the other members of the family. In that particular case, the plaintiff had, in fact, so far as could be seen from the evidence, taken as much part in the management and control of the joint property as the defendant ; and he placed his cause of action, solely on the ground that the defendant was the *karta* of the family. I intended on that occasion to say that the mere circumstance of the one man being the *karta* of the family did not make him accountable to those other members of the family who took the ordinary part in the management of the property which an adult member, living in commensality with the others, must be supposed to take, in the absence of all evidence to the contrary. I endeavoured to guard myself at that time from being understood to say more than this ; for certainly my own feeling as an English lawyer, fairly conversant with equity and practice in England, is that every man, be he *karta* of a joint Hindu family or not, who manages the property of another person, or property in which another person is beneficially interested, upon the foundation of a trust or confidence between the two, is in a Court of Equity and good conscience accountable to the latter for the mode in which he does manage it, and for the profits which he may have made out of it. The principle which I understand the English Courts of Equity to act upon in these matters is simply this,—that a person who has the control of, and management of, another's property, upon the footing of any thing which amounts to a confidence or trust reposed in him by this other, shall not be allowed to abuse that confidence, and to make a profit out of his management, without the owner's consent ; and inasmuch as the question whether or not a profit has been made, or what has been done, lies, under these circumstances, solely within the knowledge of the manager himself, a Court of Equity will make him disclose what he has done ; in other words, will make him account for his administration of the property. It is the necessity for discovery, as the English lawyers term it, in order to protect the actual owner's right and interest which founds the jurisdiction of the English Courts of Equity in cases of this sort. I regret very much that I should have so inade-

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quately expressed myself on the former occasion as to lead to the conclusion that I intended to favor the view which has been contended for here to-day, because, I think, if it had not been for that, there would hardly have been any occasion for this reference. Mr. Justice Markby's judgment did not amount to a decision. It is, I understand, nothing more than a *dictum* which was so little necessary to the determination of the particular case before him, that the learned Judge actually in that case decreed an account. It appears to me that there ought to be no hesitation on our part as to the answers which we must give to these questions.

MITTER, J.—I concur in the answers proposed ; but as I was one of the Judges by whom this reference was made, I wish to say a few words as to the circumstances under which I thought myself bound to make it.

I did not make the reference in consequence of the decision of Mr. Justice Phear in *Chuckunlall Singh v. Poran Chunder Singh* (1). I have distinctly stated in my judgment that that case was decided upon the ground that there was no evidence to prove that the defendant, who was sued for an account, was, in fact, the exclusive manager of the joint family property ; so that, properly speaking, it was not a case for account against a manager, but a suit by one of the two joint managers against the other.

The decision passed by Mr. Justice Markby, however, was the one which induced me to make this reference ; and I must say that, in that case, the construction which Mr. Justice Markby put upon the decision of Mr. Justice Phear, just now referred to, was one of the principal grounds which led me to adopt that course. Mr. Justice Markby says in that decision that it was determined, in the case decided by Mr. Justice Phear, as well as another case decided by himself (Mr. Justice Markby) and the late Chief Justice, that the members of a joint undivided Hindu family have no right to sue the managing member of the joint family for account merely upon the ground that the

(1) 9 W. R., 483.

person sued had the exclusive management of the joint family property.

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This was a proposition which appeared to me to be erroneous, and I was, therefore, obliged to make this reference to the Full Bench.

As to the questions themselves, I have nothing to add to what has been already observed by the learned Chief Justice and Mr. Justice Phear.

[ORIGINAL CIVIL.]

Before Mr. Justice Norman.

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July 6.

Award—Submission—Completion—Delivery—Act VIII of 1859, ss. 315, 318, and 320.

By an order of Court, of January 17th, 1867, a suit was referred to two arbitrators, under section 312, Act VIII of 1859, who were to make their award in writing, and submit the same to the Court within three months. No order for enlarging that time was made. The first meeting of the arbitrators was held on May 22nd, 1867, and four subsequent meetings were held, at which all the parties attended, and evidence was taken; at the last of which meetings, namely on 27th July, an objection for the first time was taken on behalf of the defendant that the time limited by the order of reference had expired, but the arbitrators proceeded with the reference. The award was made on 19th August 1867, and remained with one of the arbitrators until his death in August 1868. Subsequently it was produced by the other arbitrator, on the application of the parties to the suit, and delivered to the successful party, by whom it was brought into Court on the 10th May 1870, and judgment was moved for in accordance therewith. *Held*, that the arbitrators had authority to make the award. The award was properly submitted to the Court. Section 320, Act VIII of 1859, does not make it necessary for the arbitrators to submit the award to the Court personally. Submission to the Court, under section 320, is not necessary to the completion of an award under sections 315 and 318.

Although an arbitrator may deliver his award to one of the parties, he ought not to hand over with it the proceedings, depositions, and exhibits.

THIS was an application, on behalf of one of the parties to the suit, to have an award of two arbitrators made therein confirmed, and for an order of Court in accordance therewith. The order of reference to arbitration was made on the 17th

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January 1867, and the time fixed by the Court, within which the arbitrators were to make their award in writing and submit it to the Court, was three months. After some hearings before the arbitrators, the case was, by the desire of the parties, adjourned beyond the three months granted by the Court for the making and submission of the award. No application was made to the Court for the extension of the time. The arbitrators made and signed their award on the 12th August 1867, but they did not communicate it to the parties. In August 1868, one of the arbitrators, in whose possession the award had remained, died, and the award was, on the application of the party in whose favor it was made, delivered to him by the other arbitrator, and submitted by him to the Court on the 10th May 1870.

Mr. *Branson* in support of the application contended that the award was complete. By the English cases an award is to be considered as published when the parties have notice that it is ready for delivery on payment of the reasonable charges—*Musselbrook v. Dunkin* (1) and *Macarthur v. Campbell* (2). So soon as the award was made by the arbitrators, and was ready for delivery, it was made sufficiently to satisfy the order of the reference. The award has been submitted, however irregularly, to the Court, and the requirements of Act VIII of 1859 have been complied with. An award which is required to be in writing and ready to be delivered at a certain time is complete if made in writing and ready to be delivered by the arbitrator within the appointed time, though not actually delivered—*Brown v. Vawser* (3). In *Henfree v. Bromley* (4), an award signed and ready for delivery was then altered by one of the arbitrators, and it was held that the award was still good, and not vitiated by the alteration, the arbitrator being held to be *functus officio*, and a stranger to the award. This award was good when made and signed by the arbitrators, and it has been submitted to the Court.

The *Advocate-General* (*Offg.*) *contra*.—The award is not com-

(1) 9 Bing., 605,

(2) 5 B. & A., 518.

(3) 4 East, 584.

(4) 6 East, 308,

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plete until it has been submitted to the Court by the arbitrators after they have made and signed it. Until this has been done, the requirements of Act VIII of 1859 have not been complied with, and no valid award exists. The time fixed for the completion of the award having expired, and this having been brought to the arbitrators' notice before they made their award, they ought to have applied to the Court for an extension of time. The difference between the English form of order of reference and the wording of Act VIII of 1859 with respect to awards was intentional or it would have been the same as the English form. There is no reason for the difference, if only signature and publication were necessary, but Act VIII makes submission to the Court also requisite. The cases that have been cited, therefore, do not apply here, the form of procedure in this Court being different. There is nothing to show that the arbitrator who is dead did not alter his opinion, which he might have done; the award cannot be considered final while the power of alteration by the arbitrators remains. The time for completing the award has long expired, and the award ought not now to be enforced. [NORMAN, J., referred to *Hungate's case* (1).]

Mr. Branson in reply.

NORMAN, J.—By an order of this Court dated the 17th of January 1867, this case was referred in accordance with the provisions of section 312, Act VIII of 1859, to Baboo Grish Chandra Banerjee and Baboo Romanath Law, as arbitrators, who were “to make their award in writing and submit the same to this Court within three months from that date.” No order for enlarging the time for making the award appears to have been made. The proceedings submitted to this Court with the award show that the first meeting of the arbitrators took place on the 22nd May 1867. Subsequent meetings were held on the 12th June, the 22nd June, the 6th July, and the 27th July, which were attended by all the parties, and at which evidence was taken. On the 27th July, Baboo Dinanath Bose for Sona-

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tan Bysak, objected that the time limited by the order of reference for making the award had expired, but his objection was overruled by the arbitrators. The award was made on the 12th August 1867, but the fees not being paid, the award remained with Baboo Grish Chandra Banerjee till his death in August 1868. In May 1870, the parties applied to Baboo Romanath Law for the award. Baboo Romanath Law found it in Baboo Grish Chandra Banerjee's desk, and delivered it to the successful party, by whom it was brought into Court. Baboo Romanath Law says, "I did not personally submit it to the Court. I did so through the successful party."

Mr. Branson now moves for judgment in accordance with the award ; several objections have been taken by the Advocate General for Sonatan Bysak,—first that the objection having been taken before them, the arbitrators ought not to have proceeded to make their award after the expiration of three months from the date of the order of reference. This objection was fully and properly answered by the arbitrators. It is enough for me to say that the first meeting did not take place till after the time limited in the order for making the award had expired ; that Sonatan Bysak subsequently attended, took part in the proceedings, and made no objection till the last meeting, when he found that the decision was likely to go against him. The arbitrators show there were good reasons why the award should not have been completed within the time limited. Now it has been held, in numerous English cases, that if, after the time for making an award has expired, the parties attend further meetings before the arbitrators, with full knowledge of the circumstances, and without making any objection, they are precluded from saying that the authority of the arbitrator is at an end,—see the cases collected in *Russel on Awards*, page 144. In the present case, section 318 of Act VIII of 1859 cures any objection on the ground that the award was not made within the time limited by the order of this Court.

The next objection is that the award was not submitted to the Court until after the death of Baboo Grish Chandra Banerjee, though the order of reference provides that the arbitrators are to submit their award to the Court within three months. I was

at first disposed to think that the objection was fatal. No doubt, as a general rule, the award must follow the terms of the order of reference, and, accordingly, where the order provided that the award should be made and published to both parties by a certain day, and the arbitrators made and published it to the plaintiff and one of the defendants on that day it was held that the award could not be enforced, because it was not published to both the defendants on that day.—*Hungate's case* (1). So where an order of reference, instead of providing that the award be ready to be delivered, direct that it be delivered to the parties by a certain day, the award will not be enforceable unless it is actually delivered by that day—see Russell on Awards page 245. If the matter stood on the order of reference alone, I think it would be clear that the award could not be enforced. But as the award is one made under the provisions of Act VIII of 1859, in order to see how the award is to be submitted to the Court, we must look to section 320 of that Act. That section does not say by whom the award is to be submitted. It is to be submitted “under the signature of the person or persons by whom it is made.” There is nothing in the language of the enactment which makes it necessary that the arbitrators should personally submit the award to the Court. Section 315 directs that “the Court shall fix a time for the delivery of the award.” Section 318 provides that “when the arbitrators have not been able to complete the award within the period specified in the order, the Court may enlarge the time for the delivery of the award.”

These two sections show that the Act contemplated the award as completed before it is actually submitted to the Court.

No doubt, when there are several arbitrators, the judicial act of making an award must be the act of all the arbitrators. They must all be present together, and concur in that which is to stand as their joint judgment. But when the award is completed, and the functions of the arbitrators as judges are at an end, it matters little through what channel the award is transmitted, or, in other words, by whom it is submitted to the Court. I think, therefore, that the reason of the thing, as well as the

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change in the language, shows that the completion and delivery of the award mentioned in sections 315 and 318 is something different from the submission of the award to the Court under section 320. The award having been completed in the life-time of Baboo Grish Chandra Banerjee, I think that either Baboo Romanath Law, the surviving arbitrator or the plaintiff, who obtained the award from him, was competent to submit the award to the Court, notwithstanding the previous death of Baboo Grish Chandra Banerjee.

There will, therefore, be a decree in pursuance of the award. I desire to observe that although an arbitrator may deliver the award to one of the parties to the suit, he ought not to hand over with it the proceedings, depositions, and exhibits in the suit. These it would be his plain duty to transmit to the Court; were it otherwise, one party might get possession of valuable documents entrusted by the Court to the arbitrator or belonging to the opposite party, merely because he chose to pay the arbitrator's fees.

Application granted.

Before Mr. Justice Norman.

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May 31.

SAYAMALAL DUTT v. SAUDAMINI DASÍ AND OTHERS.

Hindu Law—Widow—Unchastity—Adoption.

A Hindu widow, who has become unchaste, is living in concubinage, and is in a state of pregnancy resulting from such concubinage, is incompetent to receive a son in adoption.

'See also
13 B.L.R. 14.
14 B.L.R. 404

THIS was a suit to establish the adoption of the plaintiff, and for partition. The plaint stated that one Iswarchandra Dutt died in April 1861, possessed of real and personal property, leaving a will, by which he left a considerable share in his property, to his wife, S. M. Thakomani Dasí, and empowered her to adopt a son; that he left him surviving his widow, the said Thakomani Dasí, a daughter, the defendant Saudamini Dasí, and Mati Lal Ruder and Rassik Lal Ruder, sons of the defendant Saudamini Dasí, and infant defendants in the present suit; that the testator appointed one Prankrishna Dutt and the defendant Premchand Dutt executors of his will, but that

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they took out no probate thereof, nor obtained any certificate in respect of his property ; that, in October in 1861, the infant defendants, by their mother Saudamini Dasi, brought a suit, against Thakomani Dasi, one Khettramohan Ghose, and S. M. Ramani Dasi, the widow of Prankrishna Dutt, to establish the will and to ascertain their respective shares under it ; that, on the 16th February 1866, a decree was made in the said suit, whereby it was declared that the said will was proved, and ought to be established ; that Thakomani Dasi was in her life-time in joint possession with the defendants of her husband's property, and wished to come to a partition of the property according to the respective shares left them by the said will, which the defendants refused to do ; that, on 13th February 1869, Thakomani Dasi, pursuant to the authority given her by the will, adopted the plaintiff Sayamalal Dutt, according to the customs and usage of Hindus ; that the said Thakomani Dasi died on the 12th June 1869, leaving the plaintiff her surviving ; and that, on the 21st December 1869, the plaintiff sent a letter to the defendants, demanding a division of the property according to their respective shares under the will of Iswarchandra, but no answer was made to the said demand. The plaintiff, therefore, instituted the present suit by his father and next friend Nilmani Kar. The plaint prayed that the adoption of the plaintiff might be established, and that he might be declared entitled to the property left by the said Thakomani Dasi, and for a partition of the property according to the respective shares therein of the several parties.

The defendant, Saudamini Dasi, in her written statement, alleged that the said Thakomani Dasi eloped with Nilmani Kar, the father of the plaintiff, in June 1868, and lived with him, under his protection, leading the life of a prostitute ; that the plaintiff was not adopted according to the customs and usage of Hindus ; that there was no legal or valid adoption of the plaintiff by Thakomani Dasi as alleged in the plaint, and that the said Thakomani, by living an unchaste life, and being unchaste at the time of the alleged adoption, was incompetent to make a valid or legal adoption ; that the said Thakomani Dasi became pregnant while living with Nilmani Kar, and died in child-birth in June 1869.

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The infant defendants, Mati Lal Ruder and Rassik Lal Ruder, by their guardian *ad litem* Jogeschandra Chowdry, filed a written statement, in which they submitted the right and interest in the subject-matter of the suit to the judgment of the Court.

Mr. Creagh (Mr. Marsden with him) for Saudamini Dasi, contended that the adoption was invalid, and that there was nothing to show that it had been properly performed, citing *Mussamut Sabitreea Dase v. Suttur Ghun Sutputtee* (1); *Roopmonjooree Chowdhranee v. Ramlall Sirkar* (2); 2 Macnaghten's Hindu Law pages 198, 199, and 202; *Dattaka Chandrika*, Section II; *Shama Churn's Vyavastha Darpana*, page 866. He also contended that a woman who has become unchaste has no power of adoption citing 2 Colebrook's Digest, page 462; *Shama Churn's Vyavastha Darpana*, pages 26, 27; 2 Macnaghten's Hindu Law, page 113; *Elberling on Inheritance*, page 88; *Tara Manee Dossee v. Motee Buneanee* (3); *Mussamut Rubbee Koor v. Jewut Ram* (4); *Ramalinga Pillai v. Sadasiva Pillai* (5); 2 Strange's Hindu Law, page 272. [NORMAN, J., refers to 2 Colebrooke's Digest, page 479]. Act XXI of 1850 does not apply to this case. That act applies only to save the rights of persons which would otherwise be lost by change of religion.

Mr. Piffard (Mr. Lingham with him) in reply.—Many of the cases cited do not apply. The case of *Ramalinga Pillai v. Sadasiva Pillai* (5) does not decide the point. A pregnant woman is not impure.—Menu, Chapter V, section 62. The impurity, if any, is that of the husband only, not of the wife.—*Ibid* section 130. All the cases cited on the other side from the *Sunder Reports* are prior to 1850. Even if it were proved that the widow by unchastity lost the right of adoption by strict Hindu law, yet, since Act XXI of 1850, she has lost none of that right.—*Doe d Sammoney Dossee v. Nimychurn Dos* (6), *Parvati v. Bhiku* (7). Loss of caste does not deprive a woman of the

(1) 2 Sel. Rep., 21.

(2) 1 W. R., 145.

(3) 7 Sel. Rep., 273.

(4) 2 Sel. Rep., 257.

(5) 9 Moore's I. A., 506.

(6) 2 T. & B., 300.

(7) 4 Bom. H. C. Rep., A. C., 25.

power to execute anything which she has the authority of her husband to perform, as adoption ; or if it did before Act XXI of 1850, it does not now. A minor widow can adopt, *i. e.*, a husband's authority can confer power to adopt on a person who otherwise might not have such power.—Shama Churn's Vyavastha Darpana, page 769. The right of adoption is in the husband.—1 Strange's Hindu Law, page 78.

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NORMAN, J.—One Iswarchandra Dutt died, leaving Thakomani, his widow, and a daughter named Saudamini. By his will he had empowered his widow, Thakomani, to adopt a son. After the death of Iswarchandra, Thakomani left the family dwelling house, and cohabited with Nilmani Kar, at a house in Simla ; from thence, at the end of Magh, or the beginning of Falgun 1275 (February 1869), she went to a garden at Synthea, where she remained two months, when her pregnancy being very apparent, Nilmani Kar asked Anno, the servant who attended Thakomani, if she knew any one who could cause abortion. In Bysak (April) Thakomani left the garden at Synthea, and went to the house of Nilmani Kar, at Sindarine, near Nuddea, where, at the end of a month, she died. After her death, a child fell from her. The Police made an investigation, the result of which was that Nilmani Kar was charged before the Magistrate at Nuddea, and again at the instance of Halodhar Ruder, the uncle of Thakomani, before a Magistrate in Calcutta, with having caused the death of Thakomani, by administering medicine to procure abortion. He was, however, released. Nilmani Kar then, as guardian of his infant son, Sayamachand, whom he calls Sayamachand Dutt, brought this suit alleging that Sayamachand had been adopted by Thakomani, in pursuance of the direction in her husband's will, on the 3rd Falgun (13th February). There is not the slightest evidence of an adoption on the 3rd Falgun. But the plaintiff has given evidence to prove an adoption on the *Sangkranti*, or last day, of Falgun (12th March). There are circumstances in the case to which I adverted in giving judgment on the facts, which led me to say that the adoption was not proved to my satisfaction, because I saw reasons for distrusting the evidence of the two principal witnesses for the plaintiff. The defendant's witnesses, Halodhar

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Ruder and Anno, have stated that no such meeting did take place at the garden as that at which the adoption is said to have been made. I cannot, however, feel quite certain that I am right in supposing that no adoption did in fact take place. And it therefore, becomes important to determine whether if an adoption did take place, it operates to confer any rights on the infant plaintiff, Sayamachand. The question is this,—a widow having a power to adopt becomes unchaste; can she, while yet pregnant by the man with whom she is living in a state of concubinage, not having performed any expiation, adopt a son under the power given her by her deceased husband?

The ceremonies used in adoption are given at length in the Dattaka Mimansa, Section 5; the Dattaka Chandrika, section 2; and Baboo Shama Churn Sircar's Vyavastha Darpana, pages 866 to 871. The ceremonies of acceptance are as follows. When the child is given, the person receiving him in adoption takes him by both hands, with the recitation of the prayer commencing "Deva Syatwa," &c., and must next offer a burnt offering of milk and curds with the recitation of the mystical invocation "Yastwa Vridha;" and the portion of the Rik Veda, commencing "Tubhya magne, and the five prayers of which the initial words of the first are "Somadadat, &c."

In order to constitute a valid adoption even among Sudras, the mere giving and receiving of a child are not sufficient. In the case of *Bhairab Nath Sye v. Mohes Chandra Bhaduri* (1), decided on the Appellate Side of this Court, LOCH, J., adopting the opinion of Baboo Shama Churn Sircar in the Vyavastha Darpana, page 876, says: "according to the Dharma Shastra as 'current in this country a Sudra should also 'act in like manner.'"

I entirely assent to the ruling in that case, which seems to me in entire accordance with the passage in the Dattaka Mimansa, Section 5, verse 56. "The filial relation of adopted 'sons is occasioned only by the proper ceremonies of gift, acceptance, or burnt sacrifice, and so forth; should either be wanting, 'the filial relation fails.'" The author, in verse 45, cites a passage from Menu: "He who adopts a son without observing the rites

(1) 4 B. L. R., A. C., 169.

"ordained should make him a participator of the rites of "marriage, not a sharer of wealth." This he explains in verse 46, by showing that the person so adopted does not become a son: see further, 3 Colebrooke's Digest, page 320, Calcutta Folio Edition, and the Commentary of Jagannatha Tarkapanchanana on the text of Vashishta, pages 323 to 325. The question then is, can a widow living in concubinage offer up the prayer and take part in the sacrifice necessary to be performed by a person adopting a child. Vrihat Menu, in a passage cited both in the Mitakshara and the Dayabhaga, declaring the widow's right of inheritance, says: "The widow of a childless man keeping "unsullied her husband's bed and persevering in religious observances, shall present his funeral oblation, and obtain his "entire share"(1). Now, remembering that the notion of offering oblations is the key to the whole system of inheritance amongst Hindus, it would seem to follow by implication that the reason why a widow forfeits her right of inheritance by unchastity is because she becomes incapable by her own act of performing religious observances, and offering the obligations for her deceased husband. In Strange's Hindu Law, Volume I, page 45, it is said "adultery subjects a woman to degradation from caste." Even though the adultery be such as to be a crime in the third degree, it causes degradation, and exclusion from inheritance, if repeated. "The effect of degradation is to exclude the party degraded from: "all social intercourse, to suspend in her every civil function, "to disqualify her from all the offices and all the charities of "life."—1 Strange's Hindu Law, page 160. The degraded person is thus disqualified from performing religious offices.

According to Hindu law a woman who, after the death of her husband, leaves her brother or other kinsman whose protection she received, and suffers the caresses of a stranger through carnal desire, is said to be the third sort of disloyal wife; she who is again espoused with solemn rites is a twice married woman, or *punarbhū*; she who receives the embraces of another man without a formal marriage, is an unchaste woman, or *Swarinisi*: see 2 Colebrooke's Digest, section 3, slokes 158 and 159, and notes. In Menu, in the Chapter on Diet, Purification, and Women,

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(1) Shama Churn's Vajavastha Darpana, 24

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section 163 relates to the twice married woman ; section 164 is as follows : " A married woman who violates the duty which " she owes to her lord brings infamy on herself in this life ; and " in the next, shall enter into the womb of a jackal, or " be afflicted with elephantiasis, and other diseases which " punish crimes." In Colebrooke's Digest, Book IV, slokes 80-83, it is set down that " a woman wilfully disloyal should be forsaken." It is ordained that an adulterous woman shall be subjected to mortifications, and restricted to such food as is necessary for the bare sustenance of life. Vijnyaneswara says, she is so to be treated " for the sake of inducing " repentance, not for the sake of atonement, since penance is " separately mentioned."—Colebrooke's Digest, Book IV, note to sloke 82. Yajnyavalkya says, see sloke 77 :—" In case of " conception by unlawful commerce, desertion is enjoined by " law." Sulapani says, *ibid*, " of course expiation is suggested in " case of disloyalty, provided she does not conceive."

In a passage (for which as well as for the citation from the Mahabharata, I am indebted to Baboo Shama Churn Sircar, the learned interpreter of this Court) from the Prayaschitta Viveka by Sulapani, it appears that an unchaste wife cannot perform the religious acts ordained in the Veda (amongst which, as the Baboo has explained to me, is the act of adopting a son) without having performed the expiatory penance.

Note A. Prayaschitta Viveka (a treatise on expiation by Sulapani (1).

" When a woman is pregnant by adultery, then she is postively " to be deserted (ex-communicated). If she continues to commit " adultery during that pregnancy, then she must perform the " expiatory penance after confinement. Thus Rishnasringa : " But a lustful young woman pregnant from a man other than " (her) husband cannot perform expiation so long as she is not " delivered of the child. She must not exercise any authority

(1) The Baboo informs me that this including those of Raghunandana, and excellent treatise on expiation is of great more frequently in Jagannatha's compilation, the translation whereof is known and almost paramount authority in Bengal, as well as in Mithila, and is cited as authority in all the Modern Digests, as " Colebrooke's Digest."

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"over the household, nor must she embellish herself (to mix in society) ; she must not associate with her husband, nor shall her friends and relatives associate with her at meals ; cohabitation with low persons, abortion (and) doing injury to the husband are acts in particular which, as well as other's positively cause degradation of women. The meaning of the term "*patita*" is explained by Gautama, "degradation," disqualification for the performance of the duties of the twice-born persons and deprivation of happiness in the next world, which (latter) according to some is damnation to hell. Duties of twice-born persons. The religious acts ordained in the Veda, viz., the presentation of the sacrificial fire, &c., and the performance of the eight ceremonies ordained by the Smriti (1), and so forth, which cannot be done without the expiatory penance, and the acts subservient thereto (namely) the repetition of the name of a god a great many times and so forth. Twice-born persons are mentioned by reason of superiority. The degradation of Sudras and others (2) is also ordained in a different passage :"

Mahabharata (3).—The chapter entitled Haribans, Volume IV, (Narada says to Arundhate) "O Arundhate (4) gifts, fastings, religious acts, and good acts of unchaste women are vain ; their religious merits also, O spotless beauty, are fruitless. Those wicked women who by the commission of adultery deceive their husbands, lose for that time the fruits of religious acts, and are doomed to hell" (slokes 754 and 755).

I have not been able to find any decision on the point whether an unchaste widow can receive a son in adoption ; but there are two as to the power of lepers to adopt, which throw much light on the subject. Lepers are deemed incompetent to perform religious observances, and incapable of inheriting because they are supposed to be polluted by crime committed in a former stage of existence. In Macnaghten's Hindu Law, Volume II, page 201,

(1) Smriti have means that part of the Hindu law which treats of religious acts and ceremonies.

(2) that is mixed classes.

(3) Published by the Asiatic Society of Bengal.

(4) The wife of the sage Vashishta ; she was famous for her virtues, and was transformed into a Star. See Colebrooke's Digest, Vol. II (London edition). p. 455.

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is a case, No. xx, in which it seems to have been decided that a person afflicted with leprosy is incompetent to adopt a son. The following case, No. xxi, shows that if the leper has performed the prescribed penance, he may adopt, and in a note a passage from the digest of Jagannatha is referred to as follows: "Raghanandana holds that expiation for a man afflicted with elephantiasis or other similar disease is ordained for the purpose of enabling him to perform acts of religion ordained in the Veda. By parity of reasoning he becomes competent to inherit property as well as to perform religious ceremonies."

In a case before the Privy Council. *Ramalinga Pillai v. Sadasiva Pillai* (1), it seems to have been taken as admitted law that an adoption by a person while under pollution, in consequence of the recent death of a relation, would be invalid. On the whole, I am of opinion that Thakomani, as an unchaste widow, living in concubinage, and being in a state of pregnancy resulting from such concubinage, was incompetent to receive a son in adoption; and, therefore, on the question of law, as well as upon the facts, my judgment is adverse to the plaintiff. The suit will be dismissed in the terms I have already intimated.

Suit dismissed.

Attorney for plaintiff: Baboo Ashutosh Dhur.

Attorney for defendant: Baboo M. C. Chatterjee.

(1) 9 Moore's I. A., 506.

[APPELLATE CIVIL.]

Before Mr. Justice Norman, and Mr. Justice Mitter.

NGA THA YA (DEFENDANT) v. MI KHAN MHAW (PLAINTIFF).*

1870
May 8.

Parties—Act VIII of 1859, ss. 73, 350—Act XXVII of 1860, s. 4—Adding Parties—Irregularity in an Interlocutory Order not Affecting Merits of the Case—Certificate of Administration—Suit by Co-heir against Holder of Certificate of Administration—Parties to Suit for Account of an Estate against Holder of Certificate.

In a suit against a co heir, who had obtained a certificate under Act XXVII of 1860, for an account of the estate of the deceased proprietor, a third party was added as a defendant, under section 73 of Act VIII of 1859, "it appearing, from the accounts put in that a large portion of the assets had been disposed of by him as agent" of the holder of the certificate. On appeal, *held* that a co-heir is entitled to follow property of the deceased into the hands of any person who has misappropriated it, and such right is not taken away by the certificate. Therefore, any person who, with the consent of the holder of the certificate, has improperly possessed himself of property belonging to the deceased, and misappropriated it, may be joined as a co-defendant. The third party was rightly so joined in this case.

The words in section 73 of Act VIII of 1859 (1), "who may be likely to be affected by the result," construed to mean "likely to be affected, if added as parties."

THIS was a suit to administer and divide the estate of the late Nga Tha. The plaint stated that the plaintiff, Mi Khan Mhaw, was the wife of the deceased; that the defendant, Nga Tha Ya, had, on the 18th April 1868, upon a representation that she was the wife of the deceased, obtained, from the Court of the Recorder of Moulmein, a certificate to collect debts of the deceased, and had, on the strength of such certificate, become possessed of the

* Regular Appeal, No. 268 of 1869, from a decree of the Recorder of Moulmein dated the 11th August 1869.

(1) *Act VIII of 1859, section 73.*—"If it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to, or who claim, some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit as the case may be. In such case, the Court shall issue a notice to such persons in the manner provided in this Act for the service of a summons on a defendant."

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effects of the deceased, and had refused to render any account thereof to the plaintiff. Hence the present suit.

The Recorder said :—"I think the proper mode of effecting this introduction to the record of a party alleged to be an accounting party in an administration suit is by making him defendant. Such a position certainly appears to be the one prescribed for him by section 73 of the Civil Procedure Code, and is the one which he invariably occupies in administration suits, as at present framed by the Equity Courts at home."

Nga Tha Ya was accordingly made a party defendant by the following order:—

"It appearing, from the accounts put in, that a large portion of assets have been disposed of by Nga Tha Ya, as agent of Mi Kho Oo, let Nga Tha Ya be made a defendant, under section 73 of the Civil Code."

On the 11th June 1869, the Recorder of Moulmein passed the following order :—

"Evidence having been taken as between the plaintiff and the original defendants on the record, the Court found that the estate was divisible into two equal parts, and that the plaintiff was entitled to one of such parts, and the defendants, as they originally stood, to the other. In investigating the assets, it appeared that the greater portion of them had come into the hands of Nga Tha Ya, as the agent of Mi Kho Oo, and Nga Tha Ya was, accordingly, added as a defendant. The learned counsel for Nga Tha Ya desires to dispute the plaintiff's claim to an account, and claims to have the rights of the original defendants to contest the property in suit. I do not think he is entitled to this. He has been made a party only as liable to account to the parties beneficially interested in the estate about to be administered, and the only issue he is entitled to have tried is, whether he has duly discharged himself of the assets which have come to his hand."

The Recorder also found that the bulk of the estate of Nga Tha came to the hands of Mi Kho Oo, the younger widow ; that she was a feeble character, and had fallen into the hands of the defendant, Nga Tha Ya, who took advantage of her experience, and possessed himself of some property be-

longing to the estate, and by a pretended sale of the same managed to secure to himself a profit of rupees 1,596; that from the accounts taken, Nga Tha Ya was liable, as an accounting party, to the estate in rupees 3,651-11, and he was ordered to pay the same into Court; that with regard to Mi Kho Oo, the Court found that she was liable to pay to the estate the sum of rupees 560-15, which amount would be debited to her in the general distribution.

On the 23rd August 1869, leave was given to the plaintiff to proceed in execution of the order of the 11th June, in the same manner as if it had been a decree of Court.

Nga Tha Ya appealed to the High Court.

Mr. *Montrieu* for the appellant Nga Tha Ya, contended that the Recorder had no jurisdiction to make the appellant a party to this suit; he was not 'entitled to,' nor did he 'claim some share or interest in the subject-matter of the suit' (section 73 of Act VIII.) There are General Orders of Chancery in England authorizing certain additions of parties; but, even could they be introduced by implication here, there is no rule of equity, nor of practice, which could warrant what has been done in this case. The agent of an accounting party cannot, as such, be joined with his principal in a suit for an account: *Attorney-Genl. v. Earl of Chesterfield* (1). *Cottle v. Aldrich* (2) was a strong exceptional case, where one, originally acting as agent for an executor, continued, after the death of the principal, to act without renewal of authority, and was treated as executor *de son tort*. That case confirms the general rule. Here it is found that the appellant had accounted with his principal, Mi Kho Oo, the certificate-holder. Nor does any question arise upon the limited character of the Indian certificate as a representative title: it has never been contended that the appellant claimed to be, or acted as, representative, or was chargeable as such. The Recorder's order is—"A large portion of assets have been disposed of by Nga Tha Ya as agent of Mi Kho Oo: let Nga Tha Ya be made a defendant under section 73."

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(1) 18 Beav., 596.

(2) 4 M. & S., 175.

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But it may be inferred from the judgment that the Recorder treated the appellant's position as simulated and a fraud upon Mi Kho Oo, and therefore upon all parties interested in the estate. He finds that Nga Tha Ya had profited by Mi Kho Oo's inexperience; that he induced her to sign a bond, although he appears "to have rendered no assistance of any sort; but on the contrary "to have so arranged with other persons as to give him a pretext "for further claims against her in respect of their service;" that, "by a pretended sale to his brother-in-law, Nga Mazin," he managed to secure to himself a considerable profit upon timber belonging to the estate. This is the special case relied on as making the ostensible and admitted agent of the certificate-holder an accounting party to the estate, jointly with his principal. Now, there can be no question of Mi Kho Oo's liability, in respect of her agent's receipts; her insolvency is not charged. The several exceptional cases of collusion and other circumstances establishing a quasi-privity with the estate or, by reason of misconduct, a liability to next of kin and creditors, referred to in *Calvert on Parties to Suits*, are distinguishable. [The learned Counsel went through and distinguished several of the cases.] No facts are found here showing the necessity or propriety of going beyond Mi Kho Oo for an account of the assets realised under the certificate. Then, the vague findings or insinuations of fraud in the Judgment are wholly unwarranted by the evidence, which fully establishes the *bona fides* of the agent's proceedings.

Mr. *Vertannes, contra.*—The first question for consideration is the position of a certificate-holder under the provisions of Act XXVII of 1860. A certificate-holder has power only to collect the debts due to the deceased, and to grant receipts; and for that reason, if there be any Government securities standing in the name of the deceased, special power to receive interest, or negotiate them, must be given to the certificate-holder. No title to the estate is acquired under the certificate; whereas under Letters of Administration, the administrator has a legal title, and fully represents the estate. Any one therefore who acts as the agent of a certificate-holder, in the disposal of the assets, is not in the same position as one who deals, similarly, with an

Administrator. In the former case, the agent is as much a wrong-doer as the certificate-holder, the principal, because the latter has no title to the estate; but in the latter case, the agent might, under certain circumstances, be protected by reason of his having dealt with a person who represented the estate, and had a good legal title to it. It is clear therefore that the appellant, in acting as the agent of the certificate-holder in the disposal of the estate, dealt with a party who had no legal title to the estate, and that he is as much a wrong-doer as his principal, the certificate-holder. The appellant is therefore as much liable to account as the certificate-holder, by reason of his having dealt with a person who had no title to the estate.

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If the law would not protect the appellant, even if he had acted properly and fairly, it ought not, for a much greater reason, to give him any protection in this case, inasmuch as it has been found by the Recorder (which finding must, for the purposes of the legal objection under consideration, be taken to (be correct) that he took advantage of his position as the agent of the certificate-holder, an ignorant woman, and possessed himself, by undue means, of the bulk of the property belonging to the estate. The appellant ought not therefore to be allowed to take advantage of his wrong, and has therefore very properly been made a party to the suit, and made to account for the property come to his hands.

The English cases, cited by the learned counsel on behalf of the appellant, do not apply to this case, inasmuch as, for the reasons already stated, there is a vast difference between the position of an administrator and that of a certificate-holder. The general doctrine recognised by Courts, in cases of misapplication of assets, is that any one who comes into possession of assets by a breach of trust or devastavit in the executor, if he be a party to, or is aware of, such breach of trust, is liable to account, and that such assets or their proceeds can be recovered from those who have received them with notice of such misapplication; Story on Equity Jurisprudence, Volume I, section 581. The assets in this case have been traced to the hands of the appellant, and he has therefore very properly been made to account.

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The appellant has been made a party to this suit under the statutory provision, section 73 of Act VIII of 1859. The object of that section is to settle in a single suit the rights and interests of all persons "who claim some share or interest in the subject-matter of the suit, or are likely to be affected by the result;" and with a view to confer, on the Courts in this country, the powers of Courts of Equity in England, which have power to make parties, having different and even opposite interests, defendants, and the object of which Courts is to put an end to litigation, and to bring all parties having any interest in the subject-matter or likely to be affected by result of the suit before the Court, and to settle, if possible, the rights of such parties in one suit.—Story on Equity Jurisprudence, Volume II, section 1526.

If, as contended, the appellant is liable to account, then it is clear that, under section 73, and having regard to the powers and the object of Courts of Equity, he has very properly been made a party defendant in this suit.

Mr. *Montrieu* was heard in reply.

The Court intimated that they would consider their decision upon the questions argued, but desired in the meantime that the disputed items of account be gone into, which was accordingly done.

The judgment of the Court was delivered by

NORMAN, J.—The plaintiff, who is one of the widows of Nga Tha, brought this suit against Mi Kho Oo, another widow of Nga Tha, who had obtained a certificate, under Act XXVII of 1860, for the administration and division of the estate of Nga Tha.

The Recorder found that the property of Nga Tha, which had come to the hands of the defendant, Mi Kho Oo, since the decease of Nga Tha, consisted of 816 logs of teak timber; that the plaintiff, as one of the widows of Nga Tha, was entitled to a moiety of the clear residue of the property; that, from the accounts filed, it appeared that the greater portion of the assets

had come into the hands of, and had been disposed of by, Nga Tha Ya, as agent for Mi Kho Oo.

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The Recorder ordered that Nga Tha Ya should be made a co-defendant. Nga Tha Ya appeared, and, by his advocate, contended that he ought not to be made accountable to any body but the defendant, Mi Kho Oo, whose agent he was. The Recorder overruled the objection. The case proceeded, and eventually the Recorder came to the conclusion that Nga Tha Ya was liable, as an accounting party to the estate, in rupees 10,128 actually realized by the sale of the timber by one Nga Mazin, or Moung Shoay Nyi, to Mr. Hannay. From this amount he deducted rupees 4,083-5, which he allowed as having been properly expended on account of the estate by Nga Tha Ya, and rupees 2,443 paid by him to Mi Kho Oo, on the like account; and directed that Nga Tha Ya should pay the balance, rupees 3,651-11, into Court.

Nga Tha Ya appeals from the decree so far as it affects him.

The first objection taken by Mr. Montrion was that the Recorder ought not to have made Nga Tha Ya a party to the suit, inasmuch as he was a mere agent, accountable only to his principal, Mi Kho Oo; the holder of the certificate under Act XXVII of 1860, and that he had, in fact, rendered a full account to her.

But the defendant, Nga Tha Ya, is not a mere agent. He is not charged as an agent. The plaintiff does not seek to render him responsible as an agent. He got into his possession a large quantity of timber, which forms almost the whole of the estate of the deceased. If the Recorder is right in his findings, he has abused the confidence reposed in him by his employer, Mi Kho Oo, the holder of the certificate, and fraudulently misappropriated timber belonging to the estate of the deceased by a fictitious sale in the name of Moung Shoay Nyi.

Mr. Montrion then contended that, in a suit against an executor or administrator for the administration of an estate, persons who have improperly possessed themselves of, or have been allowed by the executor to retain in their hands, assets belonging to the estate of the deceased, cannot be joined as co-defendants,

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except in cases where the personal representative is shown to be colluding with them, or to be insolvent. He said that it would be very hard if any agent employed by an executor was liable to have his transactions with the executor called into question in suits by creditors or legatees for the administration of the estate of the deceased; that the present suit contains no charge; and that it is not found that Mi Kho Oo, in her dealings with Nga Tha Ya, has not acted in good faith.

Now, we may observe, in the first place, that one of the several co-heirs who has obtained a certificate, and is empowered to collect debts, under Act XXVII of 1860, is in a very different position from that of an executor or administrator under English law. The executor fully represents the testator and his estate. The executor has a legal title to the personal estate. But the certificate does not vest in the holder of it any property or interest in the assets beyond what he may be previously possessed of as an heir of the deceased. The grant of a certificate does not clothe the holder of it with the character of personal representative of the deceased, further than to enable him to collect and give receipts for the debts due to the deceased. There is nothing, therefore, in the position of the holder of a certificate which would make it necessary for a creditor, or other heir of the deceased, to have recourse to him in the first instance, or which would prevent such creditor or heir from following the property which belonged to the deceased into the hands of any person other than the holder of the certificate in which he might find it.

So far as English cases go, the case of *Consett v. Bell* (1) is a decision by the then Vice-Chancellor Knight Bruce that a person who prevailed upon executors to hand over some part of the testator's assets, under circumstances from which he must have known that the executors were acting hastily, improvidently, and contrary to their duty as executors, was properly made a party in a suit against the executors for the administration of the estate, though the bill contained no charge that the executors had colluded with him, or were insolvent.

(1) 1 Y. & C., 569.

We think that, in such a suit as the present, which is one for the administration and division of the estate of the deceased, the plaintiff is entitled to have an account of the entire personal estate; secondly, that a co-heir of the deceased is entitled to follow property into the hands of any person who has misappropriated it, and such right is not taken away by the certificate, which by section 4 is made conclusive only as against a debtor to the deceased, and in favor of debtors paying their debts to the person in whose favor it has been granted. Such right cannot be affected by any act done in excess of his authority of the holder of the certificate. It follows therefore that, in such a suit as above mentioned brought against the holder of a certificate under Act XXVII of 1860, the plaintiff is entitled to join as a co-defendant any person who, with the consent of the person holding such certificate, has improperly possessed himself of property belonging to the deceased, and misappropriated it.

The next point made by Mr. Montrion was that section 73 of Act VIII of 1859 gives no power to the Court to introduce, as a co-defendant upon the record, a new accounting party.

I am strongly disposed to think that a very liberal construction should be put upon the words "persons who may be entitled to, or who claim, some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result." I would construe them as enabling the Court to add any persons to the list of plaintiffs or defendants, in whose absence the subject-matter of the suit, or the claim of the plaintiff in the suit, cannot be fully investigated and disposed of. I am inclined to think that the words "who may be likely to be affected by the result," may be construed as likely, if added as parties, to be affected by the result of the investigation and determination of the question in the cause. This will shut out cases like *Joy Gobind Doss v. Gouree Proshad Shaha* (1), where the added defendant claimed adversely, both to the plaintiff and the original defendant, and consequently his interest could not be affected by the result of the decision of any question between them.

In one sense it may be said that a person who is not a party

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to a suit cannot be affected by a decree pronounced in it. In the present case, the subject of the suit is for an account and partition of the estate of Nga Tha. The defendant says that, as to certain timber, part of that estate, he has sold and duly accounted for it. The plaintiff says that he has misappropriated this timber, and is bound to account for its value. I think that the possession of the timber, and the claim to have accounted for it constitute a sufficient interest in the subject-matter of the suit to justify the Recorder in adding him as a party under section 73.

But even if that were not so, if the 73rd section is not to receive the construction which I would put upon it, the result is this:—The defendant by an irregular order has been made a party to the suit; he has been summoned, made his answer, and after full trial, a decision has been pronounced against him.

If there was any error in making him a party to the suit at the stage in which he came into it, section 850 would probably prevent us from saying that the decree should be reversed on the ground of such irregularity.

Appeal dismissed.

Attorneys for the appellant: Messrs. Rogers and Remfry.

[ORIGINAL CIVIL.]

Before Mr. Justice Markby.

SRIMATI SARASWATI DESI AND ANOTHER v. NABADWIP
 CHANDRA GOSAIN.

1870
 March 23.

Redemption, Equity of—Sale in Execution of Decree—Act VIII of 1859, s. 271.

Under Act VIII of 1859, an equity of redemption can be sold in execution of a decree.

In this case the plaintiffs obtained a decree against the defendant, on the 30th January 1870, and sued out a prohibitory order restraining the defendant from alienating certain property in Calcutta. The property so attached was under mortgage to one Anand Lal Das. Soon after the attachment, the plaintiff's attorney, Baboo Jaya Krishna Gangooly, applied for the sale of the defendant's equity of redemption in the property. MARKBY, J., thought that, after the decision of PHEAR, J., in *Brajanath*

Kundu Chowdry v. S. M. Govindmani Dasi (1), he could not grant the order for sale as of course.

Mr. Woodroffe now renewed the application. In *Brajanath Kundu Chowdry v. S. M. Govindmani Dasi* (1), Mr. Justice Phear expressly guards himself from deciding whether or not the attachment sections of Act VIII apply to an equity of redemption. It is said that Mr. Justice Norman, on one occasion, formally pronounced an opinion in the negative; but the case is not given, and it will probably appear that, in that case, the party issuing out execution was the mortgagee himself. It has been, no doubt, held here that a mortgagee, in executing a money decree against his mortgagor, cannot attach the equity of redemption; but this case is different. *Brajanath Kundu Chowdry v. S. M. Govindmani Dasi* (1) was also that of a mortgagee executing a money decree against his mortgagor. The proviso in section 271 of Act VIII of 1859 says, "that, when any property is sold, subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale," clearly contemplating the sale of equities of redemption. If the Court were to hold that no creditor could sell an equity of redemption, there would be a great deal of fraud practised.

MARKBY, J.—I shall speak to Mr. Justice Phear, and give my decision to-morrow.

MARKBY, J.—I have consulted Mr. Justice Phear on the point raised by Mr. Woodroffe. He informs me that he did not intend to decide it in *Brajanath Kundu Chowdry v. S. M. Govindmani Dasi* (1). It appears to me that the order may be granted; but I must say that, if it had not been for the proviso in section 271 of Act VIII of 1859, I should have had considerable difficulty in granting the application. As it is, the plaintiffs are entitled to their order, but they must first of all put in an affidavit showing the value of the equity of redemption.

On a subsequent day, Mr *Bonnerjee* applied to Mr. Justice Norman on affidavit showing the value of the property, and the order for sale was granted.

Application granted.

Attorneys for plaintiffs: Messrs. *Judge* and *Gangooly*.

(1) 4 B. L. R., O. C., 83 See *Auhin v. Ahmed Mahomed*, 1 I. J., N. S., 241.

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SRIMATI
SARASWATI
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v.
NARADWIP
CHANDRA
GOSAIN.

Before Mr. Justice Markby.

ABBOTT *v.* ABBOTT AND CRUMP.

1870
April 5.

Execution—Attachment—Partnership—Property—Act VIII of 1859, s. 205.

A decree-holder, who was also a partner of the judgment-debtor, sought to attach in execution of his decree, the share of the judgment-debtor in the assets of the, partnership business, the business then being in the hands of the Receiver of the Court under a decree for dissolution and winding up. *Held*, that such share of the judgment-debtor was not property within the meaning of section 205 of Act VIII of 1859, and therefore not liable to attachment in execution.

THIS was an application for execution against the co-respondent, W. H. Crump, for non-payment of the costs adjudged to the petitioner. The application was for "attachment of the co-respondent's right, title, and interest in a two-thirds share in the assets of the business lately carried on by the co-respondent, &c."

Mr. *Marindin*, in support of the application, referred to sections 201, 205, and 212 of Act VIII of 1859, and to section 15, Act XXIII of 1861. He also cited *In the matter of Wait* (1), *Holmes v. Mentze* (2), *Davis v. Middleton* (3), and *Rajkumar Roy v. Kadambini Debi* (4).

MARKBY, J.—In this case a decree-holder, Abbott, applies for execution against the property of his judgment-debtor, Crump. The proceeding arises out of a suit in the Divorce Court, but I assume that the practice as to execution is that laid down by Act VIII of 1859. The application as amended by leave of the Court now stands thus:—

"Attachment of the co-respondent's two-thirds share in the assets of the business lately carried on by him in co-partnership with the petitioner, at No. 36, Dhurrumtollah Street, in the town of Calcutta, under the firm and style of Crump; Abbott, and Co., as chemists and druggists, which business is now in the hands of the Receiver of this Court, under a decree made in suit No. 609 of 1869, in this Honorable Court, on and bearing date the third day of February 1870." And the petition which accompanies the application now prays "for an order

(1) 1 J. & W., 608.

(3) 8 W. R., 282.

(2) 4 A. & E., 127.

(4) 4 B. L. R., F. B., 175.

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CRUMP.

"restraining the Receiver of this Honorable Court from paying
"or making over, and the co-respondent, William Henry Crump,
"from receiving, the two-thirds share of the said William Henry
"Crump, in the assets of the said partnership business now
"in the hands or control of the said Receiver, or any sum or
"sums of money, property, or effects to which the said William
"Henry Crump is entitled in respect thereof." Now, as appears
from the application itself, the creditor who is seeking to take
these proceedings is a partner in the business with respect to
which it is sought that attachment should issue; but I treat
this case precisely as if the applicant were an entire stranger.
Even so treating him, he is not entitled to have the application
granted. The question turns entirely on the construction of
section 205, Act VIII of 1859, which has already received con-
sideration in somewhat analogous cases. That section, to some-
extent, defines what property is liable to attachment; namely,
"lands, houses, goods, money, bank notes, cheques, bills of ex-
"change, promissory notes, Government securities, bonds, or other
"securities for money, debts, shares in the capital or joint stock
"of any railway, banking, or other public company or corpora-
"tion, and all other property whatsoever, moveable or immove-
"able, belonging to the defendant, and whether the same be held
"in his own name or by another person in trust for him or on his
"behalf."

The question will be whether this not being property specifi-
cally mentioned in the section, comes under the general descrip-
tion of property belonging to the defendant. The word by which
the property is sought to be attached, viz. "assets," is not of
very definite meaning; it is clear, however, what is sought to be
attached in this case. The applicant does not seek to take in
execution the stock-in-trade of the partnership. He does not
seek by the ordinary prohibitory order to prevent debtors of the
partnership from paying their debts,—he seeks to attach what
is due to the defendant after the Receiver has paid and satisfied
the debts and liabilities of the partnership. The applicant seeks
to attach two-thirds of those sums of money. I have to say, there-
fore, whether or no that is property belonging to the defendant
under section 205. One thing is clear that, whether or no by any

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use of the word "property" either in its widest legal or popular sense that which the execution-creditor seeks to attach in this case can be called "property," that the decisions of this Court have put some limitation on those words. I myself should doubt whether, however widely the word may be used, this can be called property "belonging to the defendant ;" but this Court has already put a construction upon these words, which shows they are not to be taken in their most extended sense. In the case of *Bhoobun-mohun Bannerjee v. Thacoordoss Biswas* (1), an application was made to attach the reversionary rights of the defendant in certain property. These so-called reversionary rights are not such as are understood by those words in English law, but rights of the next taker after the death of the daughters of a Hindu widow. It was decided that the attachment could not be made. It may be argued that this case is not identical with that as not only was it uncertain there what the successor would take, but who would be the successor. Here it is certain who will take, but uncertain what he will take ; or whether there will be anything after the accounts are taken. But the case, at any rate, shows that it is not every possible right which a person may have that can be taken in execution, and therefore there must be a limitation on the word "property." Another case, in which the Court has refused to issue execution, *In re Pestanji Cursetji Shroff* (2), is where the property sought to be taken was books of account, and it was refused on the ground that the property was not in its nature saleable. Mr. Marindin has referred to a case before the full Bench, *Cowar Rajkumar Roy v. S. M. Kadambini Debi* (3), in which it was held by all the Judges, that not only property could be attached, but any undivided share an execution-debtor might have in property might be attached ; and it was truly inferred from that that the word "property" must be held as extending beyond things existing and tangible. I should be bound by that judgment, in which I entirely concur. The tangibility of the property, or its existence in specie, has nothing to do with the matter. A debt is as incorporeal as a share in a house. The section suggests one limitation, and the deci-

(1) 2 Ind. Jur., N. S., 277. (2) 3 Bom. H. C. Rep., 42. (3) 4 B. L. R., F. B., 175.

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sion of Westropp, J., suggests another. Even if you could call these assets property, it is impossible to call them property belonging to the defendant. What now belongs to the defendant is a share in the stock-in-trade and in the outstandings. The sum which may ultimately be found due can hardly be said to belong to the defendant before it is known what it is, or whether there will be anything. The words of the Bombay decision are, I think, that books are not property which is in its nature saleable, by which Westropp, J., does not mean that it is physically impossible to sell it, for the books could be sold, but that they are not sold, according to the ordinary dealings of persons. I do not think it would be in accordance with the ordinary dealings of persons to sell possible sums of money which might be found due to a person after accounts have been taken. I do not mean that the Court has not a discretion after attachment to consider whether it will order a sale; but sale is the end of every attachment, and the Court ought not to issue attachment against any property which, from its very nature, ought not to be sold; and I think that anything so indefinite as the rights of this judgment-debtor ought not to be sold. I look upon this as quite distinct from a share in a railway company. The rights of shareholders are the creation of the Statute incorporating the Company, and by the words of that Statute and by common usage, they are made the subject of sale. The case coming nearest to this is that of an equity of redemption. In *Brajanath Kundu Chowdhry v. S. M. Gobindmani Dasi* (1), Phear, J., says: "I had been disposed always to take the view that the attachment sections of Act VIII do not apply to such property as an equity of redemption; and I have been told that Mr. Justice Norman, on one occasion formally pronounced an opinion to that effect. But I abstain from judicially deciding that point now." I must say I should fully concur in that doubt, and have only surrendered the doubt to the words of section 271, Act VIII of 1859, "provided that when property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale." But for those words

(1) 4 B. L. R., O. C., 83.

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I should have been inclined to hold an equity of redemption not liable to attachment. On the whole, I consider that what the judgment-creditor desires to attach is not "property" within the meaning of the words section 205. It has been brought to my notice that, in another case, in respect to this very property, Macpherson, J., granted a similar attachment; but I cannot say whether this point was brought to his notice or considered by him; and as I do not know whether Mr. Justice Macpherson differed from my view, I must leave the party to appeal rather than refer the question to a Full Bench.

Application refused.

Attorneys: Messrs. *Robertson, Orr, Harris, and Francis.*

1870
 April 7.

Before Mr. Justice Phear.

THAMA SING v. KALIDAS ROY.

Execution—Attachment—Partnership—Act VIII of 1859, ss. 233, 234.

A decree-holder in execution attached and seized certain property which belonged to the judgment-debtor in partnership with another person, who alone at the time of attachment was in actual possession. *Held*, that such property was the subject of attachment in execution of the decree against the one partner, but such attachment must be limited to his share, and the attachment should be by prohibitory order, not by actual manual seizure.

THE plaintiff had obtained a decree in this suit on December 2nd, 1869, for rupees 8,549-10, and rupees 433-5 costs, with interest at six per cent. per annum. The defendant had carried on business in partnership with one Nabinchandra Daw, principally as dealers in salt, at 34 Chalapatti, in Barrabazar. On the 12th March 1870, the plaintiff applied for execution of his decree; and by order of Court, the Sheriff attached and took possession of, on 14th March 1870, "all that *khari* salt " and *churah* salt lying in godowns in premises, 146 Huka-patti, and 34 Chalapatti, in Barrabazar, in Calcutta." On 15th March, Nabinchandra Daw gave notice of his claim to the property seized. He was at the time of seizure in actual possession of the property, but the defendant was not.

• Mr. *Kennedy* and Mr. *Phillips* for the claimants now applied to have the attachment removed.

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• The *Advocate-General* and Mr. *Marindin* for the judgment-creditor.

PHEAR, J.—I am not satisfied that the claimant has made out a title to have the attachment removed, but I think that the attachment ought to be limited to Kalidas Roy's share in the salt to which he is entitled in the firm of Kalidas Roy and Co. The mode of attachment in this case has not followed the provisions of Act VIII of 1859; the attachment should be by notice, and not manually; and that being the case, I think each party should pay his own costs. Let the matter be mentioned to-morrow, and I will then decide finally.

The next day the following decision was given by

PHEAR, J.—The judgment-creditor admits that his debtor is only entitled, as member of a partnership, to a share in the salt seized. It is contended that there is no express provision in Act VIII of 1859 which directs any particular mode of attachment to be followed in attaching an undivided share of moveable property. In England, the Sheriff can only seize the entirety of a chattel; therefore, no doubt, when a partnership share is seized and sold in execution in England, the Sheriff takes manual possession of the chattel to the exclusion of the partners. But as I understand the procedure in this country, the like difficulty does not here arise. Act VIII of 1859 provides two modes of seizure. The one is that of actual manual possession by the officer of the Court; the other is by way of formal notice, or injunction forbidding alienation. The first applies only, as I understand Act VIII, to the case where the judgment-debtor is of his own right in actual possession of a chattel or moveable property, or where some third person is in possession of it on his behalf, under such circumstances that the judgment-debtor could claim sole immediate possession of it. In my judgment, attachment by manual seizure does not apply to a case like the present. Section 233 of Act VIII of 1859 provides that, "when the property shall consist of goods, chattels, or

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" other moveable property in the possession of the defendant, the attachment shall be made by actual seizure, and the Nazir or other officer shall keep the same in his custody, or in the custody of his subordinates, and shall be responsible for the due custody thereof." Probably this section would cover the case where a third person held possession solely under the control and for the benefit of the judgment-debtor ; but it seems to be clear that section 234 intends the attachment to be by written order, whenever some other person than the judgment-debtor has the right to exclusive and immediate possession. The words are:— " Where the property shall consist of goods, chattels, or other, moveable property to which the defendant is entitled, subject to a lien or right of some other person to the immediate possession thereof, the attachment shall be made by a written order, prohibiting the person in possession from giving over the property to the defendant." Here not only is the property not as a matter of fact in the possession of the judgment-debtor, but it is in actual possession of another person who has as great a right by the admission of the judgment-creditor to immediate possession as the judgment-debtor has. I think our law of procedure does not go to the extent of authorizing the judgment-creditor to take property out of the possession of a person entitled to immediate possession, not being the judgment-debtor. I must alter the form of the attachment, but it must date as of the original date. I have now expressed my opinion only ; for I shall abstain from giving my decision till the point is referred to be decided by a Full Bench.

Application refused.

Attorney for the plaintiff : Baboo *Brajanath Mitter*.

Attorneys for the defendant : Messrs. *Gray & Sen.*

[APPELLATE CIVIL.]

Before Mr. Justice Phear and Mr. Justice Mitter.

1870
April 22.

SRIMATI SARASIBALA DEBI AND ANOTHER (DEFENDANTS) v. NAND
LAL SEN (PLAINTIFF).*

*Regulation XVII of 1806, s. 7—Mortgage—Foreclosure of Equity of
Redemption—"Stipulated Period."*

By a mortgage in the English form, the defendants conveyed certain property to the plaintiff, subject to the proviso that, in the event of the defendants paying to the plaintiff the principal sum on the 4th September 1868, and in the meantime paying interest on that sum half-yearly, with annual rests, in case of default of such payment, then the plaintiff should re-convey the property. The defendants failed to pay interest; and on the 4th December 1866, the plaintiff applied to the Judge of Chittagong for foreclosure; thereupon notice under section 8 of Regulation XVII of 1806 was issued, and served on the defendants. On the 15th April 1868, this suit was instituted by the plaintiff for the establishment and confirmation of absolute purchase, and to obtain possession of the mortgaged premises. See also 11 B.L.R. 304.

Held, that the suit was not maintainable. Regulation XVII of 1806 applied to this mortgage; and, under that Regulation, the mortgagee could not apply for foreclosure, until the time agreed upon for re-payment by the mortgagor, that is, the "stipulated period" referred to in section 7, and the mortgagee is entitled to one year's grace from notification of the application for foreclosure made after that date.

THIS was a suit instituted by the plaintiff on the 15th April 1868, for the establishment and confirmation of absolute purchase, and to obtain possession of talooks Taraff Bhawanicharan and Nilam Bhawanicharan. The plaint stated that the defendants had executed a deed of mortgage in the English form to the plaintiff's father, Gabindchandra Sen, of the said talooks, dated 4th September 1863; that the defendants made default in payment of interest; that the plaintiff's father had applied for foreclosure to the Judge of Chittagong, who, on the 4th December 1866, admitted the application and issued a notification to the defendants under section 8, Regulation XVII of 1806; that the plaintiff's father died, after the right to possession had become absolute; that the plaintiff had obtained

* Regular Appeal, No. 160 of 1869, from a decree of the Judge of Chittagong, dated the 18th March 1869.

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a certificate under Act XXVII of 1860, and now sought to obtain possession of the talook in dispute.

The defence was (*inter alia*) that, under the terms of the deed, the time specified for liquidation of the debt extended to the 4th September 1868, and therefore there could not be any foreclosure of the equity of redemption before that date ; that there was no condition that, in default of payment of interest or of any instalment, the entire amount would become due ; that the notice of 4th December 1866 was of no effect ; that the mortgagors were entitled, under Regulation XVII, 1806, section 8, to one year after notification subsequent to 4th September 1868, which they had not, and could not have, received, as the present suit was instituted prior to that date, and that therefore the plaintiff could not maintain this suit for possession.

The property was conveyed to Gabindchandra Sen, his heirs, representatives, and assigns absolutely, subject to the following provisos :—

“ Provided always, nevertheless, and it is the true intent and meaning of these presents and of the said parties hereto, that, if the said Srimati Sarasibala Debi and Himendranath Mookerjee, or either of them, their or either of their heirs, executors, administrators, or representatives, or other the representatives in estate of the said Sham Lal Tagore deceased, or any other person or persons on their or either of their behalf, do and shall, on or before the fourth day of September, which will be in the year of Christ one thousand eight hundred and sixty-eight, well and truly pay, or cause to be paid unto the said Gabindchandra Sen, his executors, administrators, representatives, or assigns, the full and just sum of rupees fifty-four thousand four hundred and thirty-seven, ten annas, and four pie, of lawful money of Bengal, and also do and shall, in the meantime, well and truly pay, or cause to be paid, interest thereon respectively at and after the rate of ten per cent. per annum, payable half-yearly, on the fourth day of March and fourth day of September in each and every year, the first payment whereof is to be made on the fourth day of March next ensuing, with annual rests in the accounts, in case of default in payment of such interest, then, and in such case, the said Gabindchandra Sen, his heirs, executors, administrators,

representatives, or assigns, shall and will, at any time or times thereafter, at the request, costs, and charges of the said Srimati Sarasiballa Debi and Himendranath Mookerjee, or either of them, their or either of their heirs, representatives, or assigns, or other the representative in estate of the said Sham Lal Tagore, reconvey and re-assure the said zemindari lands, hereditaments, and premises unto and to the use of the said Srimati Sarasiballa Debi and Himendranath Mookerjee, their heirs, executors, representatives, or assigns, or as they or any or either of them shall direct or require.

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" Provided also, and it is hereby declared and agreed by and between the said parties to these presents, and the said Srimati Sarasibala Debi and Himendranath Mookerjee do, and each of them doth for themselves, himself, and herself, and for their, his, or her executors, administrators, representatives, or assigns, covenant, agree, and declare that, in case default shall be made in payment of the said principal and interest-moneys hereinbefore mentioned, or any part thereof, on the days when the same shall respectively become due and payable, then, and in any or either of such cases, it shall be lawful for him, the said Gobinda-chandra Sen, his heirs, executors, administrators, representatives, or assigns, and he and they, is and are, hereby expressly authorized and empowered, either immediately after any such default, refusal, or event happening as aforesaid, or at any time or times thereafter (and after giving six months' notice in writing as hereinafter mentioned) of his and their own sole authority, and without any further consent or concurrence of the said Srimati Sarasibala Debi and Himendranath Mookerjee, or any or either of them, their or any or either of their representatives or assigns, and notwithstanding the minority or disability, or legal incompetency of the heirs, representatives, or assigns of the said Srimati Sarasibala Debi and Himendranath Mookerjee, or either of them, to make sale, and absolutely to dispose of the said zemindari lands, hereditaments, and premises hereby released or otherwise assured, or intended so to be, or any part thereof."

The Judge held that, from the clauses of the deed of mortgage, the parties intended, that on the expiry of the six months' notice, after default in payment of interest on any of the dates on

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which interest was stipulated to be paid in the deed, either sale of foreclosure proceedings might be commenced by the plaintiff against the defendants. On the merits of the case he decided in favor of the plaintiff, and passed a decree accordingly.

The defendants appealed to the High Court.

Baboo *Khettranat Bose* (Baboo *Aushutosh Chatterjee*, *Jadab Chandra Seal*, and *Amarendarnath Chatterjee* with him) for the appellants, contended that the suit was premature. Under the terms of the deed, the amount secured thereby would not fall due before 4th September 1868; therefore, under Regulation XVII of 1806, the defendants are entitled to one year's grace from notification after that date, and not from 4th October 1866 only.

Mr. *Paul*, on the same side, contended on the merits of the case.

Mr. *Woodroffe* (Baboo *Annada Prasad Bannerjee* with him), for the respondent, contended that the mortgage deed being in the English form was not one which fell within the operation of Regulation XVII of 1806; that, by the terms of the deed, the plaintiff, after notice given, could, on the expiration of six months, after default in paying interest, take proceedings for sale or foreclosure; and that the plaintiff was at least entitled as mortgagee to possession of the premises.

The judgment of the Court was delivered by.

PHEAR, J. (who after shortly stating the facts proceeded):— It is obvious that, neither on the 4th December 1866, when the petition was presented to the Judge of Chittagong, nor on the 15th April 1868, when this suit was instituted, had the period elapsed which, by the mortgage deed, was stipulated for the repayment of the principal sum secured; and, therefore, the question immediately arises, whether or not the suit is on that account premature?

If the Zilla Court was at liberty, and had the machinery to deal with this matter precisely upon the principles which govern the English Court of Chancery, the facts of the case are possibly such as would give the plaintiff a right of suit,

even before the expiration of the time agreed upon for the repayment of the principal debt (1); for whenever that has occurred by reason of which the mortgagor has lost his right under the deed to call for a re-conveyance of the property, and he can only get back the mortgaged premises by virtue of the right of redemption which the Court of Equity still preserves to him, then also that Court allows the mortgagee to come in and insist that the mortgagor shall elect between the exercising of this right of redemption and being foreclosed. But we think that this mortgage transaction, notwithstanding that it wears a completely English aspect, falls within the operation of Regulation XVII of 1806. It is in all respects parallel with the mortgage common in this country, which is effected by means of a bill of absolute sale, together with a contemporaneous *ikrar* for reconveyance, and mortgages of this sort have always been treated as being subject to the Regulation. The words "conditional sale," as explained by the preamble, are broad enough to cover them; and there is no doubt that they are especially within the mischief against which the enactment was directed. This being so, the mortgagee can only obtain a foreclosure by following the procedure which is laid down by section 8 of the above mentioned Regulation. And although there is some ambiguity in the words of that section relative to the time when the mortgagee may first prefer his petition for foreclosure, this is cleared up by reference to the previous section. The last clause of the 7th section runs thus :—

"The whole of the provisions contained in section 2, Regulation I of 1798, and section 12, Regulation XXXIV of 1803, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year granted for an equitable right of redemption by this Regulation." This makes it evident that the year of grace, commencing as it does with the notification which follows on the mortgagee's application for foreclosure, is intended by the Legislature to be additional to the period which is stipulated for redemption in the mortgage contract; and, therefore, it follows

(1) See *Burrows v. Molloy*, 2 Jo. & La., 1; and *Davidson's Precedents and La.*, 521; *Edwards v. Martin*, 25 L. J., *Forms in Conveyancing*, Vol. II, p. 536. Ch., 284; *Roddy v. Williams*, 3 Jo &

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that the application itself cannot be made before the expiration of that "stipulated period."

Now the "stipulated period" of redemption referred to by the Legislature in this Regulation appears to us to be the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfilment of which the mortgagor is to be entitled to a reconveyance. We do not think that it in any case means less than this, or depends upon whether the mortgagor duly performs all those conditions or not. We see no reason for supposing that the Legislature by these words spoke, not of the period of redemption originally specified in the contract (as the words themselves certainly imply), but merely of the shorter period during which the mortgagor by performance of the conditions may have preserved his strict right to redeem under the contract.

From the very object of the Regulation, it is obvious that the framers of it had expressly in view the case of a mortgagor who fails to perform the conditions necessary to give him the contract right to redeem; and if they thought of the "stipulated period" as a period terminating on the first default of the mortgagor, they would surely have used some other expression than this to convey their meaning.

According then to our view, in the case before us, the "stipulated period" did not expire until the 4th September 1868, and consequently both the presenting of the petition for foreclosure, and the filing of this plaint, occurred before the mortgagee had any right to take a single step towards foreclosing the mortgagor's equity of redemption. All the proceedings in this matter are, therefore, inoperative; the suit is without legal foundation, and must be dismissed.

The plaintiff's counsel has argued that the plaintiff is at least entitled, under the terms of the mortgage, upon the facts which have happened, to obtain possession as mortgagee of the premises in suit, but this is a cause of action entirely distinct from that upon which he has sued, and we think he ought not now to be allowed to deviate from his plaint.

The decree of the Judge is reversed, and the plaintiff's suit is dismissed. Each party will pay his own costs in both Courts

Appeal allowed

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

JOGESWAR CHACKRABATTI v. PANCH KAURI CHAKRABATTI.*

Contract—Consideration—Promise by Brother to give Sister in marriage.

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July 20.

A certain amount of money had been paid by one Hindu to another in consideration of a promise by the latter that he would give his sister in marriage to the former. The girl's mother was alive. In a suit for recovery of the amount on the ground that the latter had failed to fulfil his promise, *held*, that the suit would lie.

The following case was submitted by the Judge of the Small Cause Court of Ranaghat for the opinion of the High Court:

Case.—Plaintiff sues the defendant for rupees 59, paid to him in consideration of a promise made by the defendant, that the latter would give plaintiff his sister in marriage, which contract has been broken, and the girl married to another. Defendant was not the legal guardian of his sister, her mother being still alive. Defendant's pleader has taken an objection on the ground that the consideration being an immoral one, no action can lie for the breach of the contract, nor (both parties being equally in fault) to recover money paid on account of it. I consider part of the alleged payments proved, and refer the case for the High Court's decision as to whether the contract is a valid one.

Under the English law, it would appear, that the contract would be regarded as invalid, on the ground of its being contrary to public policy to permit marriage to be made the subject of mercenary speculation.—Addison on Contracts, page 741, 5th Edition.

It may, however, be doubted whether the English law on this subject can be considered applicable to this country, and it appears to be a common practice not only to remunerate match-makers or *Ghattaks* for their services, but also for the husband to pay a certain sum, called *Pun*, to the relatives of the wife previous to the marriage. At the same time the reasons for discouraging such practices would seem at least equally strong in this country as in England. The practice of demanding from the suitor a *Pun*, the amount of which goes entirely to the

* Reference No. 16, from the Officiating Judge of the Small Cause Court of Ranaghat, dated the 27th June 1870.

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parent's benefit, none of it being in the nature of a settlement on the wife, must undoubtedly tend to induce the exercise of parental influence from corrupt motives, and encourage the buying and selling of women.

As I am not aware that the point has been as yet decided, and as the principle involved is one of considerable importance, I have referred it for the decision of the High Court, with an expression of my own opinion that the suit cannot be maintained.

The opinion of the High Court was delivered by

JACKSON, J.—It appears to us that, in the circumstances of this case, an action to recover back the money paid to the defendant will lie.

[ORIGINAL CIVIL.]

Before Mr. Justice Macpherson.

PARBATI CHARAN MOOKERJEE v. RAMNARAYAN MATILAL
 AND OTHERS..

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 March. 11.

Deposit—Act XIV of 1859, s. 1. cl. 15—Cause of Action.

The plaintiff, on leaving Calcutta, in 1850, deposited a sum of money with A. B. and C., on which they were to pay him Rs. 9 monthly, and return the principal on his demanding it. Rs. 9 were paid to him monthly until within twelve months of this suit. A. and B. had died since the date of the deposit. This suit was brought against C. and the representatives of A. and B. to recover the amount deposited, and a decree was passed against C. on his own admission. But the representatives of A. and B. set up that the suit was barred. *Held*, that it was not a deposit under section 1, clause 15 of Act XIV of 1859. But *held* also, in accordance with the English cases (from which, however, the learned Judge dissented) that the cause of action arose from the date of the agreement to repay the money on demand, and not from the date of the demand, and therefore the suit was barred.

THE plaintiff in this suit sought to recover from Ramnarayan Matilal, and Nanda Gopal Matilal and Braja Gopal Matilal, the sons of Nilmani Matilal, deceased, and executors of his will, and Rajendra Matilal and Srimati Sibosunderi

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Debi, the administrators of the goods and effects of Gabind Chandra Matilal, deceased, the sum of rupees 1,100, with interest, being the balance of a sum of rupees 1,200, alleged to have been deposited by him with the said Ramnarayan Matilal, Nilmani Matilal, and Gabind Chandra Matilal, who formed a joint Hindu family. The defendants, the representatives of Nilmani and Gabind Chandra, denied all knowledge of the deposit, and pleaded the Statute of Limitations. The defendant Ramnarayan Matilal admitted the deposit, and in a letter addressed by him to the plaintiff's attorneys offered to pay his one-third share of the sum claimed, with interest and proportionate costs.

It appeared that Nilmani, Gabind Chandra, and Ramnarayan were the sons of one Biswanate Matilal, and formed a joint Hindu family. After the respective deaths of Gabind Chandra and Nilmani, their representatives continued to be members of the joint family, both as between themselves and Ramnarayan, until the year 1868. In the year 1850, the plaintiff, who was a distant relation, and a dependant of the family, lost his wife and only son; and having determined to retire from Calcutta and live in Benares, he sold his wife's ornaments and jewels, and deposited the proceeds, a sum of about rupees 1,194-8, with Nilmani, Gabind Chandra, and Ramnarayan, in the month of April or May 1850. At the time of the deposit, it was agreed between the family and the plaintiff that the plaintiff should receive interest on the whole sum, at the rate of rupees 9 *per mensem*, and be at liberty to draw out the whole, or any part of the money, whenever he liked; but that so long as the major part of the sum remained in the hands of the family, he was to receive interest at the above rate. The sum was entered in the books of the family to the credit of the plaintiff, under the head of *Amanat*, translated by the Court interpreter to be "deposit." Towards the end of April or May 1850, there being a few rupees due to the plaintiff on account of interest, the sum of rupees 1,200 was credited to the plaintiff on the books of the family, and a separate account was opened in the plaintiff's name. The plaintiff continued to receive his interest during the lifetimes of Nilmani and Gabind Chandra, the money being sent to him

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through one Dinanath Ghosal, since deceased, another relation of the family. There was some controversy as to whether interest was paid to the plaintiff by the representatives of Gabind Chandra and Nilmani after the separation in 1868, but no evidence was offered by these defendants to contradict the plaintiff, who swore he had received such interest. Rajendra Matilal, one of the defendants, being present in Court, was examined by the learned Judge, under section 166 of the Civil Procedure Code, but no reliance was placed upon his denial.

Mr. Woodroffe (Mr. Evans with him) for the plaintiff.

Mr. Marindin (Mr. Branson with him) for the representatives of Gabind Chandra.

Mr. Kennedy (Mr. Bonnerjee with him) for the representatives of Nilmani.—This is not a deposit such as is meant by clause 15, section 1 of Act XIV of 1859. A deposit with interest is certainly a new thing; but it cannot be placed any higher than a deposit with a banker, and in that case the ordinary limitation will take effect—*Foley v. Hill* (1), *Carr v. Carr* (2), *Devaynes v. Noble* (3). [MACPHERSON, J.—I am clear this is not a deposit within the meaning of the Limitation Act. But here the plaintiff's agreement was that the money should not be payable until he demanded payment, and it appears upon the evidence that he only demanded payment last year]. If the Court held that that was the agreement it would be a contract and would survive to Ramnarayan, and my clients could not be liable. [MACPHERSON, J.—It is a debt of the joint family, and your clients are liable, if it is not barred. But the cause of action did not arise till last year]. If the Court were to hold that debts of this kind would evade the Limitation Law, people would be able to sue for a debt after fifty years. Indeed, it could be sued for after any length of time. The object of the Legislature would thus be upset. [MACPHERSON, J.—No Legislature on earth ever intended that a case such as this should be barred]. In *Norton v. Ellan* (4),

(1) 1 Phillips, 399.

(2) 1 Meri., 541.

(3) 1 Meri., 529.

(4) 2 M. & W., 461.

Sergeant Petersdroff argued precisely in the same way for the plaintiff. He said, "when a note is payable on demand, a demand is necessary, before the Statute begins to run;" and further on, "a strong argument arises from the circumstance of its being made payable with interest, as it shows that the parties intended sometime to elapse before a demand;" to say that the Statute runs from the date of a note payable on demand, would be to say that there is a breach of contract the moment the note is written." But Parke, B., distinctly held that limitation ran from the date of the note. He further said, "that the case of a note payable on demand was the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action." Though the case is clearly barred, it will not be a hard case for the plaintiff, for Ramnarayan has admitted the debt and is doubtless liable for the whole amount.

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Mr. Branson in the same interest.

MACPHERSON, J.—The plaintiff seeks to recover rupees 1,100, being the balance of an amount deposited by him with three brothers, Nilmani, Gabind Chandra, and Ramnarayan Matilal. The plaintiff states the deposit was made in 1255 (1848), and that the three brothers agreed to pay him rupees 9 per month for interest, which was, in fact, for years paid to him by them or their representatives. The case which the plaintiff has proved is that he was a distant relation and dependant of the family of Biswanath Matilal, the father of Nilmani, Gabind Chandra, and Ramnarayan Matilal; and that he had lived in their family dwelling-house for many years; that, in 1255 (1848), being about to leave Calcutta, and to take up his abode permanently at Benares, he placed in the hands of the three sons of Biswanath (who was then dead), the sum of rupees 1,200, when it was agreed that the money should remain with them, and they should remit him rupees 9 monthly, but that when he wanted back the principal, he should have it. It is proved that the plaintiff went to Benares, and that the rupees 9 were remitted from 1255 (1848), until within the last twelve months, or thereabouts. It is proved, I think, beyond

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all doubt, that the rupees 9 per month were, from time to time, remitted till recently; but I do not decide (because in the view I take of the plaintiff's position, it is unnecessary for me to decide) whether any part of the rupees 9 was remitted by or with the knowledge of the sons of Nilmani or of the sons of Gabind Chandra: I leave the question whether they or any of them made those payments open.

It is contended, on behalf of the sons of Nilmani and Gabind Chandra, that the suit is barred, as the money was not a deposit within the meaning of clause 15 of section 1 of Act XIV of 1859. Ramnarayan Matilal admits the plaintiff's claim, but says that, as one of the three brothers (who were joint in all respects at the time they received the money), he is liable for only a one-third share of it. I think it impossible to treat the transaction as a deposit within the meaning of clause 15, for there never was any deposit of property or money which it was intended should be returned specifically. It seems to me, however, that the plaintiff might have not unreasonably contended that his cause of action did not arise till early in 1869, when he first demanded the repayment of his principal. In applying the provisions of Act XIV of 1859, the date on which the cause of action first arose must always be ascertained with accuracy; and as the plaintiff had agreed to leave the money in the hands of Nilmani, Gabind Chandra, and Ramnarayan, until he asked them to give it back to him, it appears to me that the natural and logical mode of ascertaining when the plaintiff's cause of action arose, would be to inquire when he first demanded back his money. There was, in fact, no contract by the defendants to return the money till it was demanded; and if the matter were open to me now, I should have no difficulty in deciding that the cause of action did not arise till 1869, when the plaintiff first demanded back his money. But I do not consider that the question is still open to me, after the reported decisions in English cases, in which it has been held that, when money is payable on demand, the period runs from the date of the agreement to repay on demand. I confess I do not appreciate the principle on which those cases are supposed to be decided. The English cases, however, being such as they

ate, though I dissent from them, I consider myself bound to follow them, and bound to hold that the cause of action arose when the money was put in the hands of the three brothers; and therefore that the suit is now barred. I do not, however, consider that these parties stand on exactly the same footing as the parties in the ordinary cases where money has been deposited with a banker. The position of the parties, and the contract entered into, seems to me to be of a different nature in some material respects; but the money being payable on demand, I am bound, as I have said, by the English cases.

Judgment will go against Ramnarayan for the full amount, as he admits the contract to be such as the plaintiff alleges, and that the principal remains still unpaid and justly due. But the suit will be dismissed against the other two defendants, with costs on scale No. 2. The plaintiff is entitled only to costs on scale No. 1.

Judgment for the plaintiff against one defendant. The suit dismissed against the other defendants.

Attorneys for plaintiff : Messrs. Beeby and Rutter.

Attorneys for defendant : Baboos Dinanath Bose and M. N. Holdar.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Norman, and Mr. Justice Markby.

KOEGLER (PLAINTIFF) v. YULE AND ANOTHER (DEFENDANTS).

Landlord and Tenant—Storage of Goods—Warehouse—Godown—Floor of Upper Story—Negligence.

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The plaintiff let to the defendants a godown, on an upper story over his own godown, for the purpose of storing goods, the only stipulation in writing being that no combustible or hazardous goods should be stored there. The plaintiff alleged that the premises were taken by the defendants, on the understanding that the defendants should use the same in a tenant-like manner, yet the defendants used them in an untenant-like manner, and loaded an unreasonable and improper weight on the floor, whereby it broke through and damaged the plaintiff's goods below. The evidence showed that the godown had been used by former tenants for storing light goods, but, in addition to light goods, the defendants had at the time the floor broke stored upon it several casks of white and red lead and some cases containing tin plates. The evidence of professional witnesses showed that a warehouse floor ought to be able to bear $1\frac{1}{2}$ cwt. per superficial foot, and there was evidence to show that pressure on the portion of the floor which fell was at the time 1 cwt. 1 qr. 6 lbs.

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The floor gave way in the part where the heavy goods were stored, but there was nothing to show that they were improperly stored. Evidence was given that it was not usual to store heavy goods on an upper floor, but that heavy goods were sometimes stored on upper floors. The evidence of the professional witnesses was to the effect that the floor was not a proper one upon which to store merchandize, but that $1\frac{1}{2}$ cwt. was not a dangerous weight for a warehouse floor to bear, and that no unprofessional person could have anticipated danger from it in the present instance. There was also evidence to show that the girders were not sufficient for the floor of an upper story to be used as a godown. In a suit for damage sustained by the plaintiff by reason of the breaking of the floor,—

Held (per MACPHERSON, J., and on appeal), that it lay upon the plaintiff to show that the defendants had acted in an improper and untenant-like manner, and that he had failed to show that any improper or unreasonable weight had been placed by the defendants upon the floor, or such as a tenant exercising ordinary caution might not have placed there.

THIS was an appeal from a decision of Mr. Justice Macpherson. The plaintiff, carrying on business as a merchant and agent in Calcutta, under the style of Graf and Banzigar, brought this suit to recover the sum of rupees 2,944-11-3, for damage sustained by him by reason of the conduct of the defendants. The plaint alleged that the defendants became tenants to the plaintiff of the upper floor of a godown or building, in Olive Street, which the plaintiff held on lease from the Oriental Bank Corporation; that they so became tenants on the terms that the defendants should use the same in a tenant-like manner, yet they used the said premises in an untenant-like and improper manner; and loaded on the said upper floor an unreasonable and improper weight of white lead and other merchandize, whereby on or about the 19th May 1869, the said upper floor broke and fell in, and the goods of the plaintiff were damaged and injured, and loss sustained to the amount sued for. The following letter, dated February 5th, 1869, written by the plaintiff to the defendants, was produced with the plaint:—"For the sake of regularity, we beg to mention that the terms on which we give up to you the use for three months of the upper story of the godown, at No. 2, Olive Street, rented by us from the Oriental Bank, are that the rent be rupees 150 per month, and that no combustible or hazardous goods be stored in it. Occupancy to commence from to-morrow; kindly confirm and oblige, &c." To which the defendants replied as follows:—"We have received your note of date conveying terms on which you let the godown

"at No. 2, Clive Street, which we beg to confirm." When three months had expired, the defendants still continued in the possession of the said godown, and did not vacate it.

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After the accident, some correspondence took place between the plaintiff and defendants, the plaintiff alleging that the breaking of the floor took place from the defendants having stored a large and unreasonable quantity of white lead and other heavy goods on the floor of the upper story occupied by them, without any proper consideration for the strength of the floor.

The defendants denied that they used the premises in an untenant-like manner, or that they loaded and stored an improper quantity or weight of white lead or other merchandize, or that the falling of the floor was occasioned by any improper act on their part. They alleged that the building was defective, and not fit, by reason of the want of strength of the flooring, for the purpose for which they had taken it. The premises were, after the accident, inspected by Mr. Clark, on behalf of the defendants; by Mr. Osmand of the firm of Mackintosh, Burn, and Co., on behalf of the plaintiff; and by Mr. Aitchison of the firm of Burn and Co., on behalf of the Oriental Bank.

MACPHERSON, J.—the plaintiff in this case let to the defendants a godown on an upper story, being the first floor of No. 2, Clive Street; and it appears, from two letters which passed between the parties at the time of the letting, that the only condition made by the plaintiff was that no combustible or hazardous goods should be stored in the godown. The present suit is brought by the plaintiff to recover damages from the defendant, in consequence of the floor, which was let to them, having given way and caused injury to the goods of the plaintiff stored below. The plaintiff alleges that the defendant hired the premises of the plaintiff upon the terms that the defendants should use the same in a tenant-like manner, yet the defendants used the said premises in an untenant-like and improper manner, and loaded on the said upper floor an unreasonable and improper weight of white lead and other merchandize, whereby, on or about the 19th day of May 1869, the said upper floor broke and fell in, and the goods of the plaintiff and the defendants were damaged.

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Upon this plaint the only issue is whether or not the defendants used the upper floor in an untenant-like and improper manner, and loaded an unreasonable and improper weight of goods on it.

It seems to me that no question of implied warranty that the premises let should be suitable for the purpose for which they were hired, arises necessarily in this action, because the suit is brought by the landlord who seeks to recover damages from his tenants for improper and untenant-like use of the premises. If the defendants were hereafter to sue the plaintiff for damages (which I am very far from advising them to do), the question would then probably arise whether there was any such warranty.

The issue being whether the defendants used this godown improperly, and there being nothing in the appearance of the godown to indicate to an unprofessional observer that it was especially weak, it seems to me that the question is not so much what precise weight the floor could carry safely, or what precise weight of goods was, in fact, stored upon it, as whether the defendants acting as they did, acted in an improper and untenant-like manner. Upon the evidence it is clear that the general user of this godown by the defendants was not dissimilar to that of its former tenants, Messrs. Schoene, Kilburn, and Co. ; but there is this difference in the defendants' mode of using the room that, in addition to wine and light goods, such as had always been stored there, at the time that the accident occurred, sixteen casks of white and red lead and certain cases containing tin plates were stored in the godown, and these latter articles are, undoubtedly, not light goods. In considering the question whether the defendants acted in an improper and untenant-like manner, it really comes to this, that almost the only point I have to decide is whether they acted improperly and unreasonably in taking these casks of white and red lead and these tin plates into the godown. There is not much material discrepancy in the evidence of the three professional gentlemen who have been examined, except perhaps that Mr. Clark put the bearing power of an ordinary warehouse floor higher than the other two. They were all agreed that the breaking weight of the girders which gave way was 35 tons, and

that it required a distributed pressure of 1.83 cwt., per superficial foot to cause them to break. Mr. Aitchison, speaking probably chiefly from his English experience, said that an ordinary floor ought to carry 1 cwt., and a common warehouse floor $1\frac{1}{2}$ cwt. per superficial foot. Mr. Osmond, speaking chiefly from Calcutta experience, said that 1 cwt. was sufficient in either case, while Mr. Clark said that floors ought to carry from $1\frac{1}{2}$ to 2 cwt. per foot.

On the whole I am inclined to act upon Mr. Aitchison's evidence, and to hold that a warehouse floor should be able to carry $1\frac{1}{2}$ cwt. per foot. Taking that as the weight which an ordinary warehouse floor ought to be able to bear, I think there was nothing improper or unreasonable in the weight the defendants placed in this godown. There is a certain amount of discrepancy, as pointed out by Mr. Graham, in the evidence as to what the upper floor contained at the time of the accident. But the defendant, Mr. Brown, and his sircars having stated, to the best of their knowledge, what goods were in the godown, and having said that all the goods in it were accounted for, except 77 dozens of bottles which were supposed to have been broken, and could not be traced, I think I may safely take the quantities to have been substantially such as they are stated by the defendants to have been. So I think I may also take the weights on the several parts of the floor to have been substantially such as they are said by the defendants to have been. Mr. Brown says that he himself weighed the cases, and calculated the average weights, and without saying that his figures are distinctly accurate, I have no doubt they are sufficiently so for the present purpose. He says that there was on the western portion of the room, which remained standing, only a distributed pressure of 2 qrs. and 21 lbs. per superficial foot; on the eastern portion, a pressure of 1 cwt. 1 qr. 2 lbs., while the goods which had been stored in the portion which fell, gave a pressure of only 1 cwt. 1 qr. and 6 lbs. Even making a liberal allowance, in addition to these figures, the result would still not show that there was any thing very unreasonable in the weights the floor was required to bear. Mr. Aitchison deposed that an ordinary warehouse floor ought to be able to bear $1\frac{1}{2}$ cwt. and that the weight of the floor itself ought not to be more than one-fourth of

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the whole weight which it can bear. This being so, it cannot, in my opinion, be said that the quantity of goods placed in the room by the defendants was unreasonable or improper, or such as a tenant exercising ordinary caution might not have placed there, even if one-fourth be deducted as the weight of the floor itself, from the $1\frac{1}{2}$ cwt. which such a floor ought to be able to bear.

It is true that the whole of the heavy goods were stored in the part of the floor that gave way, and it is possible, as suggested by Mr. Graham, that even if the whole weight in that part, if distributed, was only 1 cwt. 1 qr. and 6lbs., those heavy goods may have been improperly heaped together on one part. But beyond the fact admitted by the defendants that the goods were stored on the portion of the floor which gave way, there is nothing in the evidence to show that they were improperly stored by being heaped together, or piled one upon the other. It lay upon the plaintiff to show that the premises were used in an improper manner. In my opinion, as the mere fact of placing these heavy goods in the godown at all was not of itself an improper or unreasonable proceeding, the fact that they were stored over the part that gave way is not in itself sufficient to prove that there was any specially bad storage as regards those goods in particular, so as to justify me in holding that the defendants used the premises in an improper and untenant-like manner.

I do not consider it necessary to go very closely into all the details of the evidence. I base my opinion on a general view of the evidence as to the weights and quantities actually on and in the godown, and as to the bearing power of the floor in ordinary godowns. The case is one in which the plaintiff ought to have protected himself, by express stipulation, if he did not mean the godown to be used as it was. The suit will be dismissed with costs on scale No. 2.

From this decision the plaintiffs appealed on the following grounds:—

1. That on the evidence there had been an unreasonable and improper use of the upper floor of the godown by the defendants in storing white paint and other heavy goods thereon; and that by reason thereof, the said floor fell and caused the damage to the plaintiff's goods beneath.

2. That the learned Judge ought to have decided the case on the question whether the defendants loaded on the upper floor an unreasonable and improper weight of merchandize, and on that to have decreed in favor of the plaintiff, whereas he decided the case (as the plaintiff submits wrongly, in fact) on the question whether the defendants used the godown in a tenant-like manner.

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3. That it was proved, in fact, that the upper floor gave way by reason of its having been overloaded by the defendants, and that the defendants ought, under such circumstances, irrespective of any question of landlord and tenant between them, to have been declared liable to make good the damage to the plaintiff's goods.

4. That there was no warranty on the part of the plaintiff in letting the said godown that the upper floor would stand any degree of pressure, or that it was fit to store merchandize in.

5. That even if there were a warranty that the said godown should be reasonably fit for the storing of merchandize, there was on the evidence an overloading by the said defendants beyond the weight which the floor would reasonably have been expected to bear.

The appeal came on for hearing on March 29th, 1870, and was argued before Mr. Justice Norman (Officiating C. J.) and Mr. Justice Markby, but no decision was given, and the case was re-argued before COUCH, C. J., NORMAN, J., and MARKBY, J., on July 6th and 7th.

The *Advocate-General* (offg.) for the appellants.—Negligence is immaterial; the question is whether one person has a right to use his property or goods in such a manner as to damage another's—*Fletcher v. Rylands* (1), *Rylands v. Fletcher* (2). If one person so using what is his own does damage to the property of another, it does not matter whether he acts negligently or not. It makes no difference that the relation of landlord and tenant exists between the parties in the present case. If that relation makes any difference, it must be, because some warranty is implied by it; but no warranty is implied in such cases—

(1) L. R. 1 Ex., 265; S. C., 35 L. J. Ex., 155. (2) L. R. 3 H. L., 330; S. C., 37 L. J. Ex., 161.

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Hart v. Windsor (1). In *Edwards v. Halinder* (2), the plaintiff was held entitled to recover ; that was a somewhat similar case to the present one ; but the relation of landlord and tenant did not exist. The case of *Jones v. The Festiniog Railway Company* (3) shows that statutory authority may be necessary to take away the liability of a railway company ; and where the defendants used locomotive engines, without such authority, they were held liable for injury done, though they took precautions to avoid it. It was not necessary to show negligence. If it should be thought, however, that the plaintiff should have shown negligence, the case does not show it. It is to be presumed from the mere fact of the accident having occurred—*Byrne v. Boadle* (4), *Scott v. London Dock Co.* (5), *Hammack v. White* (6), *Briggs v. Oliver* (7). The evidence in the present case shows negligence in the way the goods were stored,—all the heavy goods in the middle, the part which broke ; and in the great weight of goods put in, viz., cases of lead and tin, instead of light goods such as are shown to have been previously stored.

Mr. *Woodroffe* on the same side.—If a person is bound to use his premises in such a manner as not to injure any other's property, the fact of tenancy makes no difference. If it does make a difference, it must be by some right given by the relation of landlord and tenant, and such right must in this case be independent of the particular circumstance that the godown let was over the plaintiff's own premises. The acts of the defendants in this case have been such as to render them *prima facie* liable—*Lambert v. Bessey* (8) ; see Fitzherbert's *Natura Brevium*, 89. They have used their premises in such a manner as to cause injury to the property of another, and no negligence is necessary to be shown—*Hodgkinson v. Ennor* (9), and case

(1) 12 M. & W., 68

(2) Popham's Rep., 46.

(3) 37 L. J., Q. B., 214.

(4) 33 L. J., Ex., 13.

(5) 34 L. J., Ex., 17 ; S. C., on appeal, *Id.*, 220.

(6) 11 C. B., N. S., 594.

(7) 35 L. J., Ex., 163.

(8) 2 Ld. Raymond, 421, 422.

(9) 4 B. & S., 229.

cited by Blackburn, J., in page 240 of the report. Moreover, there was negligence in the storing of the goods, and the *onus* lies on the defendants to show that the goods were properly stored, and not on the plaintiff to prove improper storage.

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Mr. Kennedy for respondents.—There was no such negligence on the part of the defendants as, if negligence was necessary to make them liable, would make them liable. It cannot be said that a person may let another a house for a certain purpose, and then bring an action against him for using it for the purpose for which it was let. The case of *Fletcher v. Rylands* (1) stands on the basis of the plaintiff not having brought himself into such a position as to make him likely to incur risk. So servants have to take the risk arising from the act of their fellow-servants. So if cattle going along the highway stray into an adjoining place, an action does not lie against the owner if he use reasonable diligence to get them out. The owner of the field is bound to fence his property—*White v. Bass* (2), *Fletcher v. Rylands* (1), *per* Blackburn, J. If a person in using his property takes ordinary care not to injure his neighbour's, he is not liable for damage. [NORMAN, J., refers to *Gregory v. Piper* (3)]. The principle is, that, if a man puts property in the possession of another for any purpose, he cannot, if due precautions are taken, and the property is reasonably used for the purpose for which it was let, complain of any nuisance arising from such use—*Hall v. Lund* (4). In *Tenant v. Golding* (5) there was a want of repair on the part of the defendant. A person who let a race-stand in which the plaintiff had taken a place that fell down has been held liable—*Francis v. Cockrell* (6). [COUCH, C. J.—Is there any case where it has been held that a man who lets property guarantees it to be fit for the purpose for which it is let?] No, but the case of *Hart v. Windsor* (7) does go so far as is contended the other way. A carrier does not guarantee the carriages he carries passengers in—*Readhead v. The Midland Ry. Co.* (8). The mere fact that the floor gave

(1) L. R. 1 Ex., 265, S. C., 35 L. J. Ex., 155. (5) 1 Salk., 360; S. C., Ld. Raym., 1089.

(2) 7 H. & N., 722.

(6) 5 L. R., Q. B., 184.

(3) 9 B. & C., 591.

(7) 12 M. & W., 68.

(4) 1 H. & C., 676.

(8) 4 L. R., Q. B., 379.

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way does not show negligence—*Welfare v. London and Brighton Ry. Co.* (1). In *Vaughan v. The Taff Valley Ry. Co.* (2), and *Jones v. Festiniog Ry. Co.* (3), the defendants were held liable, because they had no authority to use locomotive engines. Here they had authority to use the godown for the purpose for which they did use it. In the two cases last cited, the defendant would have been excused by legislative authority; here he is excused by the authority of the plaintiff who let him the godown. In using it for the purpose for which it was let, damage arises, and no negligence is proved; the defendant therefore is not liable. [The Court referred to *Brand v. Hammersmith Ry. Co.* (4).] The cases of *Vaughan v. The Taff Valley Ry. Co.* (2) and *Jones v. The Festiniog Ry. Co.* (3), together with *Hall v. Lund* (5) and *White v. Bass* (6), go far to show the truth of the principle that a person has a perfect right to use in a proper manner, and for a proper purpose, premises that he has taken for that purpose.

Mr. Evans on the same side.—Some negligence must be shown, and none is shown here. The fact of an accident happening is not necessarily proof of negligence—*Bird v. The Great Northern Ry. Co.* (7), *Hammack v. White* (8). A horse running away is not necessarily a proof of negligence. The case of *Scott v. The London Dock Company* (9) and many others lay down the proper principle that, where a person passes along by permission a place where a trade is being lawfully carried on, he does so at his peril, and the defendants have in those cases been held not be liable. Granting the principle in *Hart v. Windsor* (10) that there is no implied warranty in letting a house that it is fit for habitation, yet it does not follow that the landlord of that house could bring an action against his tenant, if he was using a room let for habitation, though damage might have been done to the landlord's property underneath, by the floor giving way.

(1) 4 L. R., 2 B., 698.

(2) 29 L. J., Ex., 247.

(3) 37 L. J., Q. B., 214.

(4) 2 L. R., Q. B., 223.

(5) 1 H. & C., 676.

(6) 7 H. & N., 722.

(7) 28 L. J., Ex., 3.

(8) 11 C. B. N. S., 594.

(9) 34 L. J. Ex., 17; S. C., on appeal
Id., 220.

(10) 12 M. & W., 63.

The want of privity is very material. In *Edwards v. Halinder* (1), the person who was injured was not the lessor; the decision depended on their being strangers—*Murchie v. Black* (2). The general rule is that strangers can recover, but this does not apply where there are special circumstances.

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The *Advocate-general* in reply.—The cases of *White v. Bass* (3) and *Hall v. Lund* (4) do not bear at all in the present case. It is contended that *Tenant v. Goldwin* (5) does not apply in cases where the relation of landlord and tenant exists; but there is no ground for saying in this case that the plaintiff took the risk of having a different kind of goods stowed in the godown, or stowed in such a way as they were. In *Fletcher v. Rylands* (6) it is said there are some exceptions, but the defendants do not show that they came under an exception. The cases on the right to support of surface show, that when earth gave way, without negligence being shown, defendant was liable—*Haines v. Roberts* (7). [NORMAN, J., referred to *Solomon v. The Vintners Co.* (8).] In this case the plaintiffs have not diminished the support; the floor gave way because the defendants put too great a weight on it: and therefore used it unreasonably.

COUCH, C. J.—The substance of the plaint in this case is that the defendants were tenants to the plaintiff and his deceased partner of the upper floor of a godwon in Clive Street, Calcutta; and that they loaded on the upper floor an unreasonable and improper weight of white lead and other merchandize, whereby it broke and fell in, and the goods of the plaintiff and his deceased partner were damaged. The suit was heard before Mr. Justice Macpherson, who considered that the only issue upon the plaint was, whether or not the defendants used the upper floor in an untenant-like and improper manner, and loaded an unreasonable and improper weight upon it, and finding that in the defendants' favor, he dismissed the suit with costs. The plaintiff has appealed from this decree.

(1) Popham's Rep., 46.

(2) 19 C. B., N. S., 190.

(3) 7 H. & N., 722.

(4) 1 H. & C., 676.

(5) 1 Salk., 360; S. C., 2 Ld. Raym., 1089.

(6) L. R. 1 Ex., 265; S. C., 35 L. J. Ex., 155.

(7) 7 E. & B., 625.

(8) 4 H. & N., 585.

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Before considering the question of law which has been raised, it will be better to state the view I take of the facts. Mr. Justice Macpherson, says :—" It is clear upon the evidence " that the general use of the godown by the defendants was not " dissimilar to that of its former tenants, but there was this " difference in the defendants' mode of using the room, that, " in addition to wine and light goods such as had always been " stored there, sixteen casks of white and red lead, and " certain cases containing tin plates; were stored there at " the time of the accident." This has not been disputed before us. Some evidence was given for the plaintiff that it is not usual in Calcutta to store heavy goods in an upper floor. That does not appear to have had any weight with the learned Judge, and I think rightly, because if the floor is not loaded in any part with a greater weight than it ought to be able to carry, the description of the goods is not material, and the letter of the 5th February 1869 puts no restriction upon the use of the godown, except that no combustible or hazardous goods should be stored in it: and it is not alleged in the plaint that it was part of the terms of the tenancy that heavy goods were not to be stored in it. There was also evidence for the defendants that heavy goods are sometimes stored on an upper floor. Upon the evidence of the three professional witnesses, Mr. Justice Macpherson held that a warehouse floor should be able to carry $1\frac{1}{2}$ cwt. per foot, and he concluded from the evidence that the goods which had been stored on the portion of the floor which fell gave a pressure of only 1 cwt. 1 qr. and 6 lbs. The learned Judge was satisfied with the evidence of Mr. Thomas Brown, an assistant to the defendants, as to the storing of the goods, and I see no reason for thinking that he was wrong in this, or that we ought to come to a different conclusion on this point. If the pressure was only 1 cwt. 1 qr. and 6 lbs., it would not make any difference whether the goods were light or heavy goods. But there is evidence in the case, not noticed in the judgment, which should be considered. Mr. Aitchison, one of the plaintiff's witnesses, who went to the premises a day or two after the accident, and examined the floor, said he agreed with Mr. Clark to the weight of the floor, and he should not

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have considered such a floor calculated to store merchandize on. "I mean," he said, "a floor having such a weight of brick-work on the girders," that there ought to be a surplus strength of three-fourths after the merchandize was on; he would not expect a floor to break with half a cwt. above the average, and he said the floor had the appearance of having been a roof; he imagined it had been a roof originally. Mr. Osmond, another of the plaintiff's witnesses, said he did not consider the girders proper girders for a floor for merchandize, and that he would not anticipate danger from storing $1\frac{1}{2}$ cwt. on a proper upper warehouse floor. Mr. Clark, the defendants' witness, said that he made about 35 tons distributed to be the breaking weight of the girders, in which the other witnesses agreed with him; that he made the weight of the floor 15 tons on each girder, and considered the proper load for an iron girder certainly not exceeding one-third of its breaking weight; that he considered 1 cwt. a low estimate for the weight of goods that might be stored, and those girders were only sufficient for the floor; even then they were loaded above the one-third; and that no unprofessional person who had not ascertained the state of the floor could have anticipated danger from it. Mr. Aitchison also said that no unprofessional man could judge that the floor was not suited for a warehouse. This evidence, I think, shows that the girders were not sufficient for the floor of an upper story to be used as a godown, which was what the plaintiff and his deceased partner let it for, and that the defendants had no reason to suspect that the girders were not sufficient.

Upon these facts, then, I have to consider whether the defendants are liable for the damage which the plaintiff has sustained.

In the argument before us, the counsel for the plaintiff relied upon the rule of law laid down by the Court of Exchequer Chamber and the House of Lords in *Fletcher v. Rylands* (1) and *Rylands v. Fletcher* (2). There A. was the lessee of mines, and B. the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to con-

(1) L. R., 1 Ex., 265; S. C., 35 L. J. (2) L. R., 3 H. L., 330; S. C., 37 L. J. Ex., 155. Ex., 161.

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struct it. A. had worked his mines up to a spot where there were certain old passages of disused mines ; these passages were connected with vertical shafts which communicated with the land above, and which also had been out of use for years, and were apparently filled with mud and the earth of the surrounding land. No care was taken by the engineer or contractor to block up these shafts, and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passages, and flooded A.'s mine. The Lord Chancellor (Lord Cairns) said, " The principles upon which the case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used ; and if in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or under ground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground, in quantities and in a manner not the result of any work or operation, on or under the land ; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their peril ; and if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable." It appears to me that, applying that principle to the present case, the defendants are not, upon the facts which have been proved, liable for the injury which the plaintiff has sustained.

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The upper floor was let by the plaintiff and his partner to the defendants to be used as a godown, and the storing of goods there was a purpose for which it might, in the ordinary course of enjoyment, be used. The storing of the goods on the upper floor was a lawful user, and authorized by the terms of the tenancy. As long as the defendants used the upper floor in a reasonable and proper manner, and did not load an unreasonable and improper quantity of goods upon it, they were not using it for a purpose which the Lord Chancellor says he might turn a non-natural use. To make the principle applicable, it was necessary for the plaintiff to show that the defendants used the floor in an unreasonable and improper manner, and this he has failed to do; because, although in some cases an accident of this kind might of itself be evidence that the upper floor was unreasonably and improperly by used, it cannot be so where it is proved that the floor was insufficient to bear the weight which might ordinarily and properly be put upon it. Where the facts are equally consistent with the presence or absence of negligence the plaintiff cannot recover—*Cotton v. Wood* (1), and the defendants are not bound to show that there was no negligence. Lord Cranworth said he concurred in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber:—"If a person brings "or accumulates on his land anything which, if it should escape, "may cause damage to his neighbour, he does so at his peril. If "it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have "taken to prevent the damage." But I think these words must be understood, with reference to the facts of the case before him, where the person was not the tenant of his neighbour, and the bringing the thing on the land was not in accordance with or authorized by the terms of a tenancy between them. This appears more clearly in Mr. Justice Blackburn's judgment. He says:—"We think that the true rule of law is that the person who, "for his own purposes, brings on his land, and collects and keeps "there anything likely to do mischief if it escapes, must keep it in "at his peril; and if he does not do so, he is *prima facie* answerable

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“ for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default ; or, perhaps, that the escape was the consequence of *vis major*, or the act of God ; but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seemson principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose cellar is invaded by the filth of his neighbour’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour’s alkali works, is damnified without any fault of his own ; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, and answer for the natural and anticipated consequence. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.” Mr. Justice Blackburn does not say that, if the person damnified had let the reservoir to his neighbour, and he was only using it in the ordinary way, or had let the alkali works, and the fumes and vapours were only such as were ordinarily caused by the use of the works, that the tenant would be liable for the injury. None of the cases which he proceeds to notice would have supported this proposition, and I think it is clear, from the whole of his judgment, that he would not have applied the rule in such a case. In the case of landlord and tenant, the true rule seems to be that the tenant is not liable, unless the premises are used in an unreasonable and improper manner, or for a different purpose from that for which they were let. The operation of the rule *sic utere tuo ut non ledat alienum* is qualified by the tenancy, by which an authority

is given to use the premises in a certain manner. It would be obviously unjust to make the tenant liable to make good to the landlord any injury to him which is caused only by the premises being so used. The case of *Murchie v. Black* (1) was decided upon this principle. There it was held that the licence of the vendor of two ordinary lots of lands, the plaintiff standing in exactly the same position as if his lot had remained in the vendor's possession, took away that which would otherwise have been a cause of action for depriving his building of the support it had from the defendant's land. And *Rowbotham v. Watson* (2) is an analogous case. The landlord has taken upon himself the risk of the premises being used as a godown, and the rent may be considered as partly paid for it. I think the true principle has been applied in this case, and that, upon the evidence which was given, the plaintiff is not entitled to recover for the damage he has sustained.

Mr. Justice Norman has authorized me to say that, although he does not entirely concur in this judgment, he does not think it necessary to give a separate one.

MARKBY, J.—I am of the same opinion.

Judgment affirmed.

Attorneys for the appellants: Messrs. *Collis & Co.*

Attorneys for respondents: Messrs. *Gray & Sen.*

(1) 19 C. B., N. S., 190.

(2) 6 E. & B., 593; S. C., 8 H. L. C., 348.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

THE QUEEN v. VAUGHAN AND ANOTHER.

IN THE MATTER OF S. M. GANESH SUNDARI DEBI, *alias* MANI.1870
May 11.*Habeas Corpus—Minor—Discretion—Return—Affidavit—Amendment.*

The return to a writ of *habeas corpus* must be taken to be true, and cannot be controverted by affidavit. In England, 55 George III, c. 100, s. 4, allows affidavits to be used to controvert the return in criminal matters, but that statute does not apply to this country.

The return to a writ of *habeas corpus* can, however, be amended.

A girl, under sixteen years of age, has not such a discretion as enables her, by giving her consent, to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian ; but where the return to the writ of *habeas corpus* stated that a girl was above the age of sixteen (though her mother stated her to be of the age of thirteen years and nine months), the Court held that she was of years of discretion to choose for herself under whose protection she would remain.

Mr. Ghose in this case had applied for a writ of *habeas corpus* directed to J. M. Hazra and the Rev. J. Vaughan, ordering them to bring up the body of S. M. Ganesh Sundari Debi alleged to be a minor under the age of sixteen years. The writ was applied for at the instance of the girl's mother, who, with Chandra Sekhar Sen and Dinanath Sen, the girl's two elder brothers, filed a joint affidavit which stated that the said S. M. Ganesh Sundari Debi was an infant of the age of about thirteen years and nine months ; that since her birth, she had been living in the same house with them during the life-time of her father under his control and guardianship ; and since his death, about two years ago, under the joint guardianship of her mother and brothers ; that she was married, according to Hindu law, when she was about nine years of age, but her husband died a few months after the marriage, and she never lived in her husband's family, or under the protection of any of his kinsmen, either before or after she became a widow, as they had not sufficient means to enable them to take her

See Ind. L. R., 1 Cal., 78.

under their guardianship and protection ; that she was under the guardianship and protection of her mother and brothers until the evening of the 29th April 1870, when she was induced by one Martha, a native Christian, belonging to the Church Missionary Society, to leave her mother's and brothers' house and protection, and had not since returned ; that they had found that she was in the custody of J. M. Hazra, a native convert, and of the Rev. J. Vaughan, at the Church Mission premises, at Amherst street in Calcutta, and had applied to them to return her to her house ; but that J. M. Hazra and the Rev. J. Vaughan had refused to allow her to be removed, and still detained her from their custody and guardianship against their consent and against the consent of her husband's kinsman ; that they were informed and believed that J. M. Hazra and the Rev. J. Vaughan had induced her to abjure the Hindu religion, and made her a convert to Christianity, although she was still a minor, and incapable of forming a correct judgment in matters of religion ; that they were informed and believe that it was the intention of J. M. Hazra and the Rev. J. Vaughan to marry her forthwith to some person professing the Christian faith ; although being a minor she was incapable of exercising a proper discretion as regards her marriage ; and that they were desirous that the girl should remain under their care and guardianship until she attained her majority, and not in the custody of any person or persons without their consent.

A writ of *habeas corpus* was therefore issued, to which the following return was made :—

“ John Mathuramohan Hazra, and James Vaughan, a clerk in holy orders, employed by the Church Missionary Society, at Amherst street in Calcutta, the persons to whom the writ hereto annexed and marked A, subscribed with our initials is directed, do severally hereby certify and return to our sovereign lady the Queen in her High Court of Judicature at Fort William in Bengal ; that, before the coming to us of the said writ, to wit, on the evening of Friday the 29th April last, S. M. Ganesh Sundari Debi, *alias* Mani, in the said writ named, of her own free will and accord, and without any force, threat, persuasion, or inducement used,

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offered, held out by us, or either of us, or by*any person or persons employed by us, or acting under the authority or direction of us, or either of us, to our or either of our knowledge or belief, came to the mission premises at Amherst street aforesaid, and then being of an age and condition at which she lawfully might and could choose and determine her own place of residence, did, in the exercise of her own discretion, thenceforth remain and reside without any restraint whatsoever ; that the age of the said S. M. Ganesh Sundari Debi, on the said 29th of April last, was (as she herself avers) (1) upwards of sixteen years, that is to say, of the age of seventeen years or thereabouts ; that the condition of the said S. M. Ganesh Sundari Debi was that of widowhood ; her husband to whom she was married at the age of nine years, having died about eight years ago ; that she was and is childless, and had not, previous to the said 29th of April, at any time lived with the family of her deceased husband or under their protection ; that her father being dead, she resided with her widowed mother ; that after the said S. M. Ganesh Sundari Debi came to the said mission premises, and whilst so residing therein as aforesaid her said mother and her brothers and friends had free access to her, and saw and conversed with her frequently, and we have in the presence of her said relatives and friends, or some of them, repeatedly informed the said S. M. Ganesh Sundari Debi that she was at perfect liberty to return to her mother's house, as she was by her said relatives and friends required to do, if she felt so inclined, but she invariably refused so to return ; and in answer to the various threats urged against her remaining at the said mission premises, and the various promises and inducements held out to her, on condition of her quitting the same, by her said relatives and friends, she constantly expressed her determination to remain at the mission premises, and there to be admitted by baptism into the Christian religion, which, after upwards of three years' study and instruction therein, with the knowledge of her said mother, she had resolved to embrace ; that among the inducements so held out to her as aforesaid by her said relatives and friends was marriage ; and that the mother and the elder

(1) The Court at the hearing allowed these words to be struck out.

brother, Chandra Sekhar Sen, in the presence of the said John Mathuramohan Hazra and my wife, assured her that a wealthy zemindar was most anxious to marry her ; but to this, as to all other inducements held out by them, she turned a deaf ear ; that we, nor either of us, nor any person employed by or acting under the authority of us or either of us, have or has not ever designed to marry the said S. M. Ganesh Sundari Debi to any person, either with or without the consent of her mother, nor save as aforesaid, was the subject of marriage ever mentioned to our knowledge or belief to her, the said S. M. Ganesh Sundari Debi ; that on the afternoon of Tuesday, the 3rd of May instant, the mother of the said S. M. Ganesh Sundari Debi came to the mission premises, and there saw and conversed with me, the said J. M. Hazra, and my wife, and entreated us not to permit the said S. M. Ganesh Sundari Debi's elder brother (who had, within the day or two preceding the said 3rd of May, become almost beside himself with rage) to approach her, alleging that he had vowed that, rather than let her be baptized, he would conceal a knife in his clothes, and stab his sister ; that on the same evening, at her urgent request, the said S. M. Ganesh Sundari Debi was admitted by me, James Vaughan, into Christ's religion by baptism ; that on the following morning, the said S. M. Ganesh Sundari Debi's mother, who had been informed of her daughter's said baptism by a Bengali letter written by me James Vaughan, and addressed and sent to her, came to the said mission premises, accompanied by the brother of the said Ganesh Sundari Debi, and a number of influential members of the Brahmo Somaj, with the leader of which somaj the said S. M. Ganesh Sundari Debi is connected, and her mother and brother endeavored to persuade her to return with them ; that the said S. M. Ganesh Sundari Debi refused to do so, and again and again positively declined to accompany her said mother and brother to their house, although she was at perfect liberty so to do, and has since remained and resided of her own free will at the said mission premises ; that on Saturday, the 7th May, the mother of the said Ganesh Sundari Debi, in the presence of me, J. M. Hazra, and my wife and mother, again saw her said daughter, and urged her to say that she was only fourteen ; but the said S. M. Ganesh Sundari

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Debi replied :—" Mother, I cannot and will not tell this lie ;" and again expressed her determination not to return to her mother's said house ; that we, nor either of us, nor any persons employed by us or either of us, or acting under our or either of our authority or direction, to our knowledge or belief, have not nor has detained, nor do we, or any person so employed or acting as aforesaid, now detain, in our or either of our or his or her custody, the said S. M. Ganesh Sundari Debi ; but being of such age and condition as aforesaid, she of her own free will and unbiassed discretion lives and resides at the said mission premises which are under the care and superintendence of Mr. James Vaughan, in and with the family of Mr. J. M. Hazra, which consists of myself, my wife, and one child of the age of seven years, as a member thereof in my J. M. Hazra's house, situate within the said mission premises ; and that having requested the said S. M. Ganesh Sundari Debi to accompany us, and she having consented to do so, we have here now the body of the said S. M. Ganesh Sundari Debi before our sovereign lady the Queen's said Justice, as by the said writ hereto annexed, and the order enlarging the time for making this our return we are commanded. Dated this 10th May in the year of our Lord 1870.

(Sd.) J. VAUGHAN.

J. M. HAZRA.

In obedience to the writ, Ganesh Sundari Debi was brought into Court, and the present application was that she should be delivered over to the custody of her mother :

Mr. Kennedy, Mr. Ghose, Mr. Evans, and Mr. Mendes, in support of the application, contended that the mother was by law entitled to the custody of her child, and that she had been properly brought up under a writ of *habeas corpus* ; and being a minor, should be delivered into the custody of her parents—*Queen v. Nesbitt* (1), *King v. De Manneville* (2). In that case it seems to have been thought that eighteen was the age at which a person was

(1) Perry's Or. Cas., 103 and 108, note. (2) 5 East, 220.

entitled to be of age of discretion—*In re Alicia Race* (1) ; that the return was insufficient in merely stating her age ; the time and place of birth should be clearly stated ; that affidavits might be admitted to controvert it—*In re Hakewill* (2) *per* Jervis, C. J. ;

• *In re Dime* (3). [PHEAR, J.—*In re Leonard Watson* (4), Lord Denman refused to admit affidavits to controvert the truth of any part of the return.] *In re Alicia Race* (1), affidavits were used. [PHEAR, J.—That was on a rule ; the affidavits came before the Court as part of the rule.] The parties making the return cannot be able to judge of the age of the girl so well as her mother. The return is ambiguous ; it should have been supported by affidavits to clear the ambiguity ; and it cannot now be amended—*Reg. v. Roberts* (5). The girl should properly be in the custody of her parents. The age of discretion of a Hindu is sixteen years. The Criminal law makes it a penal offence to take a child from the custody of her guardians under a certain age, and the guardians may claim her back if so taken under that age—*O'Connor's case* (6) *Queen v. Howes* (7), which last case was decided on the Statute 4 & 5 Phil. and Mary, c. 8, s. 3.

Mr. Ghose on the same side.—A girl under sixteen ought to be made over to her guardians—see *Brejonath Bose's case* (8), where a boy was ordered to be given up to his guardians against his own wishes. A decision to the same effect was made in *Queen v. Nesbitt* (9) ; *Queen v. Ogilvie* (10) decided the contrary, but that case has been overruled, and it is the only authority of the kind in this Court. *In re Hemnauth Bose* (11) extended the principle to boys of sixteen, and we have in our favor also a Madras case—*In re Culloor Narain Swamy* (12) ; the English authorities are also in our favor—*King v. De Manneville* (13), *In re Hakewill* (2), *In re Clarke* (14), *In re Elizabeth Daley* (15), *Queen v.*

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(1) 26 L. J., Q. B. 169

(2) 12 C. B., 223.

(3) 14 Q. B., N. S., 554.

(4) 9 A. & E., 731.

(5) 2 F. & F., 272.

(6) 16 Ir. Com. Law. Rep., 112.

(7) 30 L. J.M. C., 47.

(8) Unreported. Cited in 1 Taylor, 139.

(9) Perry's Or. Cas., 104.

(10) 1 Taylor, 137.

(11) 1 Hyde, 111.

(12) Unreported. Cited in Mayne's Penal Code, s. 361.

(13) 5 East, 220.

(14) 7 E. & B., 186.

(15) 2 F. & F., 259.

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Howes (1). In *King v. Greenhill* (2), it was held that age, and not discretion, was the criterion. By Hindu Law the guardianship of the girl is in the mother.—*Vyavashta Darpana*, 216. "If the husband's family become extinct, or contain no male, or "be helpless, the kin of the widow's father are her guardians."—2 *Colebrooke*, page 384. "The rights of Hindu parents are not to be "invaded."—21 *George III.*, c. 70, s. 18. The sex of the child is an additional reason why she should be handed over to her parents. Of a woman it is said:—"Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence."—*Menu*, Ch. V, s. 148. Under Act XL of 1858, the girl is a minor until the age of eighteen. See the Full Bench decision in *Madhusudan Manji v. Debigobinda Newgi* (3).

Mr. Woodroffe, contra.—The Court cannot go behind the return, which must be taken to be true. The statements therein are quite sufficient. As to vagueness, their own affidavits are much more ambiguous than our return. They state the age of the girl to be about thirteen years and nine months, but nothing further is said. No horoscope is produced; and no time and place of birth stated. The return says she is above the age of sixteen years, and this must be taken to be so—2 *Hawkin's Pleas of the Crown*, 169; *Rex v. Rogers* (4), *In re Leonard Watson* (5), *R. v. Delaval* (6), *R. v. Clarkson* (7), *King v. Greenhill* (2), *per Lord Denman*. A *habeas corpus* is not the proper mode of procedure to obtain a decision as to who is the proper guardian for a child, it is granted as a remedy for the invasion of personal liberty. There is no allegation here of want of her consent. [PHEAR, J.—That would be immaterial if she is a minor]. My contention is she is not a minor; and her want of consent ought to have been stated—*King v. Wiseman* (8), *Ex parte Lands down* (9), *Queen v. Clarke* (10). In *Queen v. Howes* (1), the Judges

(1) 30 L. J. M. C., 47.

(2) 4 A. & E., 624.

(3) 1 B. L. R., F. B., 49.

(4) 3 Dow. & Ry., 607.

(5) 9 A. & E., 731.

(6) 3 Burr., 1435.

(7) 1 Stra., 444.

(8) 2 Smith, 617.

(9) 5 East, 38.

(10) 7 E. & B., 186.

had an interview with the girl, and they found she had not discretion to choose for herself, and gave their decision accordingly, and she was delivered up to her father. The cases decided on the Statute 4 & 5, Phillip and Mary, c. 8, s. 3, and 2 George IV, c. 31, s. 20, are immaterial here, as those Statutes apply to unmarried girls. The decision in *Queen v. Howes* (1) fixes sixteen as the age of discretion; but it has not been fixed by any case in this country. Cases under the Penal Code must be decided according to the circumstances of each case, and not by what the age of the girl is. To come to the decisions in this country, the first is *Brejonath Bose's* case (2), but there is nothing to show that this case actually occurred; it is not reported. *Queen v. Nesbitt* (3) was decided on the ground that religious differences ought not to be interfered with. But the only question is whether this girl has a discretion to choose where she will go; it is no question of religion. *In re Hemnauth Bose* (4) is an unreliable decision; it was not followed in a late case in Bombay by Arnould, C. J., see Mayne's Penal Code, s. 361. *Queen v. Ogilvie* (5) decides the point in our favor on the authority of *King v. Greenhill* (6), and that case was approved of in the case of *Alicia Race* (7). By Hindu law, a father is bound to provide his daughter with a husband; if he fails to do so, she may choose one for herself after waiting three years from the time of puberty. The passage from Menu Chapter V, that woman is never fit to be independent is of doubtful authority, as is shown by its being in italics. Nareda is not an authority, in Bengal—Dayabhaga, Chapter XI, section 1. The girl here is above the age of sixteen, and, therefore, at age of discretion. The period of majority is not necessarily co-extensive with the period of discretion. There is no English case in which this has been decided or even considered. The age of majority by Act XL of 1858 is eighteen, but that is no reason why eighteen is the age before which a person may be said not to have arrived at years of discretion. But I contend that eighteen is not the age of majority in this Court, as

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(1) 30 L. J. M. C., 47.

(5) 1 Taylor, 137.

(2) Unreported. Cited in 1 Taylor, 139. (6) 4 A. & E., 640.

(3) Perry's Or. Cas., 104.

(7) 26 L. J., Q. B., 169.

(4) 1 Hyde, 111.

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Act XL of 1858 does not apply to this Court, but only to the 'mofussil,—see section 29 of that Act and *In the goods of Gungaprasad Gosain* (1). See also *Mangala Debi v. Dinanath Bose* (2), in which this seems to be allowed by the Court, as after it had been argued that a person between sixteen and eighteen was a minor, the Court called for no reply on that point. This girl should be allowed to use her own discretion as to where she will go. She has received religious instruction for some time, and the Court will not interfere in those matters, or to unsettle any impressions that may have been formed—*In re Moore* (3). All religions should be alike in the view of the law—*Reg. v. Roberts* (4). On Mr. Kennedy's rising to reply, Mr. Woodroffe objected and referred to *In re Leonard Watson* (5), where there appeared to have been no reply, but the Court disallowed the objection. Mr. Kennedy in reply.—The return is not binding, and need not be taken as true—2 Hawkins' Pleas of the Crown; *Goldswain's case* (6). The period of majority has been decided to be eighteen years—*Madhusudan Manji v. Debigobinda Newgi* (7), and the contrary does not appear to be decided, with respect to this Court, by *In the goods of Gangaprasad Gosain* (1). On the contrary, MACPHERSON, J., says expressly he does not decide it and it is not decided on appeal, nor is the point referred to in *Mangala Debi v. Dinanath Bose* (2). The Court will not fix itself to any particular age, but will look at the capacity—*King v. Greenhill* (8). For the forms of return in other cases, *Brejonath Bose's case* (9), *Queen v. Howes* (10), *O'Connor's case* (11). The Statute of George III may be taken to be declaratory of the Common law, and thus might be applicable here—Broom's Constitutional Law, 82; *Queen v. Ogilvie* (12). The effect of admitting that the girl could change her religion and had discretion to do so, would be to make Hindu law inapplicable to her, and, therefore, twenty-one

(1) 4 B. L. R., App., 48; S. C., on appeal, 5 B. L. R., 80.

(2) 4 B. L. R., O. C., 72.

(3) 11 Ir. Com. Law Rep., 1.

(4) 2 F. & F., 272.

(5) 9 A. & E., 731.

(6) 2 W. Bl., 1207; 5 Coke, 71.

(7) 1 B. L. R., F. B., 49.

(8) 4 A. & E., 624.

(9) Unreported. Cited in 1 Taylor, 139.

(10) 30 L. J. M. C., 47.

(11) 16 Ir. Common Law Rep., 112.

(12) 1 Taylor, 137.

years would be her period of majority—2 Colebrook's Digest, 284.

Mr. Macrae appeared for Ganesh Sundari Debi, but was not heard.

PHEAR, J.—On Friday last, at the instance of Bamasundari Debi, the mother, and Chandra Sikhar Sen and Dinanath Sen, the brothers of one Ganesh Sundari Debi, a writ of *habeas corpus* issued out of this Court, directed to two persons, named Hazra and Vaughan, commanding them to bring before the Court the said Ganesh Sundari Debi who was said to be illegally detained by them. Ganesh Sundari Debi is now, I believe, in Court, and Messrs. Hazra and Vaughan have made a return to the writ substantially to the effect that they have not detained and do not detain her in their custody; that she is of full age; that she is still with them of her own free will; that they exert no control over her; and that she comes to Court of her own accord, in pursuance of advice given by them. The case is one involving elements which cause it to be a subject of remarkable public interest. In some sense, as the learned counsel for the defendants has mentioned, it necessarily represents a contest between creed and creed, and perhaps race and race; and no thinking man, I suppose, can avoid regretting exceedingly that this event should have occurred. I can readily believe that those gentlemen who are here placed in the unenviable position of appearing to encourage a young Hindu girl, in the determination to sever herself from her mother, her brothers, and the home of her childhood are deeply conscious of the misfortune into which circumstances have placed them, for I can conceive no greater disaster than this as likely to befall the cause to which they are devoted, and I will say, the yet broader and higher cause which the intelligent portion of the European community has at heart. But with considerations of this sort, I have nothing to do.

The writ of *habeas corpus ad subjiciendum* is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen shall be illegally confined against his will. It is issued on behalf of the person said to be illegally con-

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fined. It is not issued for the purpose of lending the arm of the law to any person claiming to have authority over him. It is only where the person confined is under any personal disqualification, that the guardian or protector is looked to in the enquiry ; and in such a case, the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian. Therefore, in the matter now before me, I can have no concern with what the mothers and brothers of Ganesh Sundari Debi think or desire, until I have ascertained, if the fact be so, that she is not of age or discretion to judge for herself. Then what are the facts before me bearing on this point. I must look to the return, and so far as the facts there appear, I must take them as true.

Mr. Kennedy was correct in urging that there are authorities in support of the position that the truth of the return to the writ may be controverted by affidavits ; but so far as I am able to discover, and so far as my own experience has gone, those authorities are of very early date, and are not now binding. Later decisions have all gone the other way. In Comyn's Digest (1) it is laid down that the Court must remand a prisoner if the return be sufficient though false ; and in Hawkins' Pleas of the Crown, Book II, Chapter 15, section 78, it is said that " it seems " to be agreed that no one can in any case controvert the truth " of the return to a *habeas corpus*, or plead or suggest any matter " repugnant to it ; yet it hath been holden that a man may confess and avoid such return by admitting the truth of the " matters contained in it, and suggesting others, not repugnant, " which take off the effect of them." In *Ex parte Beeching* (2), upon the return to the writ *habeas corpus*, it appeared that the person making the return had apprehended and detained Beeching and several other persons, under the provisions of 24 Geo. III., c. 47, and 45 Geo. III., c. 121, on a charge of smuggling ; and Abbott, C. J. (than whom no more learned Judge has presided over the Queen's Bench at Westminster) allowed affidavits controverting the truth of the facts as stated for reasons which he gave as follows:—" The object of the *Habeas Corpus* Act, 31

(1) Title *Habeas Corpus*, 438 F.

(2) 4 B. & C., 136.

“Car. II, c. 2, was to provide against delays in bringing persons to trial who were committed for criminal matters. The person making this return is not a person to whom the prisoners have been committed for any such matter. The *habeas corpus* in this case was therefore a writ issuing by virtue of the Common Law, and I think that, under the circumstances, the 56 Geo. III, c. 100, s. 4, gives the prisoner a right to controvert the return.” Lord Tenderden thus placed the right to controvert the truth of the return upon the Act of Geo. III. The distinction in the cases seems to turn on this, namely, that, unless the 56 Geo. III, c. 100, applies (and it does not apply to this country), the return to the *habeas corpus* cannot be questioned on the occasion of determining the validity of the detention.

I think that all the cases cited by Mr. Kennedy and Mr. Ghose tend to confirm that view. If there had been the power at Common Law, the very learned Judges who determined those cases would certainly not have been ignorant of it, and could hardly have felt the hesitation which they expressed in regard to the question whether or not affidavits, repugnant to the return, could, under any circumstances, be admitted. I pointed out, however, during the argument, several modes in which the person making the return may be made responsible for it, and in more than one of these courses of procedure, affidavits are, no doubt, admissible for the purpose of proving falsehood in the return. In one stage of *In re Leonard Watson* (1), for instance, affidavits were, I believe, used for such a purpose. But while the truth of the statements in the return cannot, as I think, be questioned, it is certainly clear that the return may be amended. It is unnecessary to quote authorities in support of this last position. At the commencement of the case, I allowed the return to be amended, and it is enough to say now that I have more than one decision before me to show I had authority to do so. Then, looking at this return, among other things I find it thus stated:—“On the evening of Friday, the 29th day of April last, S. M. Ganesh Sundari Debi, *alias* Mani, in the said suit named, of her own free will and accord, and without any force,

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I have also had an interview with the young lady, in which she told me that she was under no restraint, and that she preferred to remain where she was, rather than go back to her mother. If then by law Ganesh Sundari is possessed of a personal discretion in this matter, I have no alternative but, to dismiss Mr. Kennedy's motion. There is no doubt that, in England, the discretion, in regard to the matter of personal freedom, does not involve directly the element of minority. A large number of well known cases have been discussed by counsel on both sides, and, I think in all of them, it is held that the discretion for this purpose is a matter to be judged of by reference to the circumstances of each case, with, however, this limitation, namely, that in England, it has of late been determined by inference from the criminal enactments that, below a certain age, the law does not allow a discretion on the matter to a female infant. The latest case on that point is *Queen v. Howes* (1). In that case the Chief Justice says that the enactment to which he refers points out the age of sixteen as the age up to which a child ought to remain under parental control. His words are:—"By the Statute 9 Geo. IV, c. 31, "s.20, the unlawfully taking away an unmarried girl, under the age "of sixteen, out of the possession, and against the will of her father, "is a misdemeanor, notwithstanding the consent of the child." We may safely act by the guidance of the light thus thrown on the subject, and say that, until the age of sixteen years, a young woman cannot choose to act for herself. The decision given by the Chief Justice apparently was not limited to the case of a female, but his argument was so. I entirely adopt the rea-

(1) 30 L. J. M. Q., 47.

soning which the Court followed in that case. In this country we have the Penal Code, section 361 of which makes it an offence to take or entice a female child under sixteen years of age out of the keeping of her lawful guardian. The words lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor.

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I understand by the words of the section that the Legislature here contemplated a case where the abductor had obtained the consent of the girl. It follows then that, in this country, as in England, a girl under sixteen has not a discretion such as enables her by giving her consent to protect any one from the criminal consequences of inducing her to leave the keeping of a lawful guardian; in other words, she is not allowed by law to choose for herself. But this young lady I must take to be above sixteen years of age; the return to the *habeas corpus* says she is seventeen. She is therefore outside that class of minors whom the Penal Code impliedly deprives of all choice in this matter, and I have not been shown any authority in support of the contention, that a girl of upwards of sixteen years of age has no discretion with regard to her personal freedom. It is true that Mr. Ghose referred me to some venerable and venerated precepts of Hindu sages which have the effect, as he himself said, of placing a woman in a legal dependence on the males of her family for her whole life. If, on the occasion of this return (where I may remark I am not trying and adjudicating upon a question of civil rights as between party and party), I am bound to give weight to this class of authorities, this consequence must follow, namely, that no woman of any age could be liberated from restraint placed on her by the head of her family, notwithstanding it was completely against her will, and such a result would, in truth, amount to a suspension of the *Habeas Corpus* Act for all female members of the Hindu community. It is sufficient to state the necessary consequence of such an argument to show that I ought not now to allow myself to be influenced by it. While this case has lasted (now some days,) I have thought over carefully and anxiously this last issue, *i. e.*, what amount or kind of personal disqualification or infirmity ought to lead this Court to refuse discretion to

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a female who is upwards of sixteen years of age. From the beginning I felt no doubt on any other matter brought before me, but on this I confess my mind has at times wavered, and my hesitation was not a little increased by my interview with the girl. I have no reason, from my own observation for supposing that the return in the matter of age is incorrect, and indeed, if I had such reason, it would not be in such a shape that I could give it effect. But I am bound to say that I could not avoid drawing the conclusion that the young lady is, as far as my judgment goes, exceedingly ignorant on matters of general information, and very ill-informed on that particular subject which, she says, has engaged her attention, and has been the particular purpose of her masters to instruct her in for the last two years. It appeared to me, from that undoubtedly very short interview, that she does not possess in regard to it any very tangible idea which can be termed accurate. Her ignorance of the structure of the one Sacred book seemed to me something in itself marvellous, considering that (as I understood her) it has of late been almost the sole object of her studies. I cannot blind myself to the dangers which must be incurred when a person so young, ignorant, and uninstructed as this person appears to be, takes the perilous step of leaving the society of those who have been about her all her life, and goes to strangers whose very names she does not know. Still I could see nothing in her to indicate that she has not sufficient capacity of mind to choose in the matter of her own freedom: for nothing, I apprehend, can be clearer than that personal discretion of that sort does not, in the eye of the law, depend on the mental culture or state of instruction of the individual. If it were so, there would be an end to the liberty of the poor and ignorant. On the whole, I think that Ganesh Sundari Debi is a young woman who has attained an age, when the law will allow her to speak for herself. I can perceive no such special disqualification as would justify me in keeping from her that liberty to which all alike, without regard to sex, are entitled. I only trust she will exercise that power of choice as may be best for her welfare. I must dismiss Mr. Kennedy's application. Ganesh Sundari must be

brought before me into Court, when I will tell her that she may go where she likes (1).

Application Refused.

Attorney for the applicants: *Baboo N. N. Sen.*

[ORIGINAL CIVIL.]

Before Mr. Justice Markby.

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NUSSEEM EZEKIEL JUDAH AND OTHERS (DEFENDANTS).

Will—Void Bequest—Uncertainty—Superstitious Uses.

N. E. J., a Hebrew merchant, domiciled in Calcutta, and possessed of both real and personal property, died, leaving a will, by which, after appointing his mother, K. E. J., and his brother, J. E. J., executrix and executor thereof, and making various bequests and provisions, he made the following bequest of the residue of the property: "And what may remain after payment of the above-mentioned sums as well as the debts, shall remain under the control of my brothers S. E. J. and J. E. J., for the purpose of defraying therewith the expenses for the year and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their Judgment." *Held*, assuming that the High Court should act in conformity with the English Court of Chancery in carrying out charitable bequests, that as far as the bequest related to giving of alms for the testator's spiritual benefit, it was void for uncertainty. The "defraying expenses and making charitable distribution" were limited by the bequest to the year within which the testator died.

Semble.—The English rule of law which prohibits the bequest of money to superstitious uses, has no application in India.

Nusseem Ezekiel Judah, a Hebrew merchant, domiciled in Calcutta, died on the 15th April 1865, possessed of real and personal property within the jurisdiction of the High Court at Calcutta, leaving him surviving his mother, Khatoon Ezekiel Judah, his two brothers, Joseph Ezekiel Judah and Sassoon Ezekiel Judah, the plaintiffs, his wife Sarah, one of the defendants, now the wife of Aaron Raphael Belilios, his son Aaron Hye Nusseem Ezekiel Judah, and his daughter Furha Nusseem Ezekiel Judah, also defendants.

Before his death, Nusseem Ezekiel Judah made a will, in the Arabic language and Hebrew character, dated the 10th April

(1) The girl was then brought into Court; and after being told by the Judge that she might go where she pleased, and

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1865, of which the following was accepted by all parties as a correct translation :—

"I, Nusseem Ezekiel Judah, in perfect understanding and sound health, do make this will, for this purpose, that afterwards when my time comes, and I depart this world by the command of Almighty God, it is proper for my executors, who are my mother Khatoon Ezekiel Judah, and my brother Joseph Ezekiel Judah, to act and perform, according as stated below, that is with respect to the houses and money which I die possessed of. The same must be distributed in this manner, that is the five houses (called) Fenwick buildings, and the house No. 3, in Council House Street, and the house No. 43, Chowringhee Road, and also the house No. 5-1, Dacre's Lane. The said houses will remain for my son Aaron Hye, together with the income derived therefrom, and the same must neither be sold nor made over into his hands, but remain under the control of my executors aforesaid. They are to receive rents, and pay all the expenses, and what may remain clear or net, after payment of all the expenses, with the same they are to purchase for him Company's papers, once in every sixth month, and also they are to lay up a sum to the amount of five thousand rupees in cash, and with the same they are to purchase for him Company's paper, which shall remain under the control of my executors aforesaid, until he completes the age of twenty-one years. In like manner they are to keep or preserve for my daughter, Furha, the House No. 4, Humayoon. The same must neither be sold nor made over into her hands, but remain under the control of my executors aforesaid, who are to receive rents and pay all the expenses, and what may remain clear net (with that) they are to buy for her Company's papers until she completes the age of twenty-one years, or until it be in her fortune to be married. Now as respects the houses remaining in excess of these houses, which are set apart for my son, Aaron Hye, and my daughter, Furha, aforesaid, that is to say the house No. 15, Armenian Street, and the house No. 16, Armenian Street (these two houses) must be sold, and in case I die possessed of money, the same must be added to the price of the houses sold, namely the house No. 15, Armenian Street, and the house No. 16, Armenian Street. In the first place, it is necessary for them to liquidate all my debts in Calcutta, as well as in other districts or provinces,

and what may remain after the payment of the debts out of that they must first give to my wife, Sarah, the daughter of David Hakeem Aaron Gubboy, the sum of twenty-five thousand rupees only, and the jewels, which are with her, are her property. In like manner, the house No. 63 in Creek Row, which I have assigned to her (literally put down in her name) is also her property. Except the above property, there remains for her no kind of property, even a single rupee, and further my executors aforesaid will receive all the debts owing to me from people in Calcutta as well as in the other districts or provinces, and likewise they will pay all the debts due by me. And my said executors shall be able (competent) to take possession of all the shares as well as insurance shares which I may be possessed of, and they shall be able to sell the same, and my executors aforesaid will adjust accounts with them (the partners) of all partnership transactions which I have with people. *And what may remain, after payment of the above-mentioned sums, as well as the debts, shall remain under the control of my brother, Sasoon Ezekiel Judah, and my brother Joseph Ezekiel Judah, for the purpose of defraying therewith the expenses for the year and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their judgment.* Now, as regards the houses which I have set apart for my son Aaron Hye, should any event (mishap) befall him, which God forbid, before his completing the age of twenty-one years, or before his marriage (then) those houses shall be sold, and the sale proceeds, as well as the income, shall be distributed in the following manner. One-fourth will go to my daughter Furha, half to my brother Joseph Ezekiel Judah, and one-fourth to my brother Abdoollah Ezekiel Judah. Issued from Calcutta, and written on Monday the 14th of Neesam 625, corresponding with the tenth of April of the year one thousand eight hundred and sixty-five.

NUSSEEM EZEKIEL JUDAH.

Witness to this

Ibrahim Shaloom.

Solomon Simon.

Witness to this

Hyam Baruk

Myer Hyam."

Khatoon Ezekiel Judah, the executrix named in the said will, renounced probate, and probate was granted, on the 10th May

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1865, to Joseph Ezekiel Judah alone, and he thereupon took possession of the estate and effects of the testator. Subsequently, on the 21st July 1869, Joseph Ezekiel Judah, by deed duly executed in exercise of the powers given by Act XXIV of 1867 (The Administrator-General's Act,) appointed the then Administrator-General of Bengal, and his successors, to be executor and trustee of the said will in the place of him, Joseph Ezekiel Judah, and the residue of the testator's estate, consisting of Government securities to the extent of rupees 20,500 of the 5 per cent. loan, a share in the Port Canning Dock and Reclamation Company limited, and rupees 511-3-7 in cash came into the hands of C. S. Hogg, the then Administrator-General.

On the 15th February 1870, Joseph Ezekiel Judah and Sassoon Ezekiel Judah filed their plaint, against the defendants Aaron Hye Nusseem Ezekiel Judah, Furha Nusseem Ezekiel Judah, Sarah Belilios and Charles Swinton Hogg, the then Administrator-General of Bengal, charging, that according to the true intent and meaning of the will, the residue, after payments made for the purpose of providing for the one year's expenses of the deceased, ought to be delivered up to them as trustees for the purpose of charity for the benefit of the soul of the deceased, according as they should think proper.

There was no dispute as to the facts, and the only question before the Court was the construction of the passage "And what may remain after payment of the above-mentioned sums, as well as the debts, shall remain under the control of my brother Sassoon Ezekiel Judah and Joseph Ezekiel Judah, for the purpose of defraying therewith the expenses for the year and making charitable distributions as commanded and giving alms for my spiritual benefit according to their judgment."

Evidence was given, on behalf of the plaintiffs, to show that it was customary, on the death of a Jew in the station of life of the testator, to expend sums of money in prayers and charitable distributions for the space of one year from his death.

Mr. Kennedy and Mr. Wilkinson for the plaintiffs.

Mr. Cowell and Mr. Bonnerjee for Aaron Hye Nusseem, Ezekiel Judah, and Furha Nusseem Ezekiel Judah.

* Mr. Woodroffe and Mr. Evans for Sarah Belilious.

The Advocate-General (Offg.) and Mr. Piffard for the Administrator-General.

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Mr Kennedy for the plaintiff.—It was the intention of the testator to confer a benefit upon his soul, and he gives a discretion to the trustees as to the mode of the application of the money. The Court can only interfere with them, if there is a clear dereliction on their part in not applying the money for the purposes set out in the will. It will probably be contended, by the other side, that this bequest is not for any philanthropical object, but only for the benefit of his own soul, and therefore that it is not good, but this could not be sufficient to render the bequest void. A bequest to superstitious uses will be carried out by a Court in India, whatever the English law on the subject may be. *Andrews v. Joakim* (1), which extends the application of the decision in *Das Merces v. Cones* (2). In *Read v. Hodgens* (3) a bequest of residue for masses for the testator's soul was held to be valid, and not void as a superstitious use. In the matter of *Michell's Trust* (4) is in point. In that case the Master of the Rolls puts the bequest for reading prayers on the same ground as a charity. As we are not here affected by the Statutes regarding superstitious uses, we have a gift in the nature of a charitable gift, and one in the discretion of the trustees, and the Court is bound to carry it out. Such a gift would, no doubt, be carried out by the Court of Chancery, if it had not the suspicion of a superstitious use.

Mr. Cowell for Aaron Hye Nusseem Ezekiel Judah and Furha Nusseem Ezekiel Judah.—The plaintiffs sue as residuary legatees of what they say is a well defined trust. With regard to the bequest for superstitious uses, the cases cited by the other side show that such bequests are not void; but I would refer to them for a different purpose, in so far as they show that the bequests mentioned in them were particularly defined, but here

(1) 2 B. L. R., O. C., 143.

(2) 2 Hyde, 65.

(3) 7 Ir. Eq. Rep., 17.

(4) 28 Beavan, 39.

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we have an undefined bequest for giving alms, and it is not a good one.—I Jarman on Wills, 3rd edition, pp. 189, 195. [MARKBY J.—The gift may be both for superstitious and charitable uses, the motive may be superstitious, but the object charitable.] Yes, but when a bequest is for charitable purposes and also for purposes of an indefinite nature, the bequest is void—*Vezey v. Jamson* (1). The clause now in question is split up into three sections, the first relating to the expenses of the year, the second to charitable distributions as commanded, and the third to giving alms for the testator's spiritual benefit. In the case of similar gifts there are authorities to show they are void. In *Williams v. Kershaw* (2), a direction to apply the residue of personal estate for such benevolent, charitable, and religious purposes, as they, in their discretion, should think most advantageous and beneficial, was held to be void for uncertainty. [Mr. Kennedy.—That case is overruled by *Miller v. Rowan* (3).] No, it had never been reported, but having been referred to in *Miller v. Rowan* (3), it seems was published by the reporter; besides *Williams v. Kershaw* (2) has been followed. In *Morice v. The Bishop of Durham* (4) a bequest in trust for such objects of benevolence and liberality, as the trustee in his own discretion should most approve, cannot be supported as a charitable legacy, and is, therefore, a trust for the next of kin. The first bequest cannot be defied, nor can the second, and it is impossible to say what is commanded in the third. You cannot apportion the bequest; if part is valid, and part void, the whole is void. *Morice v. The Bishop of Durham* (4), *Vezey v. Jamson* (1), *Thomson v. Shakespeare*, (5). The words "as commanded" clearly make the bequest void. See *Aston v. Wood* (6).

Mr. Piffard for the Administrator General—It has been suggested that *Williams v. Kershaw* (2) and *Morice v. The Bishop of Durham* (4) have been overruled by *Miller v. Rowan* (3). Such is not the case, on the contrary the judgment of Lord Brougham respects those cases. *Miller v. Rowan* (3) was decided on the

(1) 1 S. & S., 69.

(2) 5 Cl. & F., 111

(3) *Id.*, 99.

(4) 10 Ves., 522.

(5) 1 Johnston, 612.

(6) L. R., 6 Eq., 419.

Scotch law only, not on the English. This bequest must be treated disjunctively, and the Court would have to decide what kind of alms are for the benefit of the soul, and if it so decides, that it does what the Court of Chancery would not do. It appears there was a residue of upwards of thirty thousand rupees, and it could hardly have been the intention of the testator to leave such a large residue to charitable and superstitious uses only.

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Mr. *Evans* for Sarah Belilios, argued in the same interest, and cited *Ommaney v. Butcher* (1). Alms for the benefit of the testator's soul cannot be put any higher than a private charity, and the Court will not carry out a charity of this description—*Nash v. Morley* (2).

(Upon Mr. Kennedy rising to reply, Mr. Piffard objected, on the ground that as no evidence had been adduced on behalf of the defendants, the plaintiffs had no right of reply. MARKBY, J.—This is in the nature of a special case, and I am of opinion that the plaintiffs have a right of reply. Besides, here Mr. Kennedy could not anticipate the arguments of the side opposed to him, and it is right that an opportunity should be given to him to answer the defendant's arguments.)

Mr. *Kennedy*, in reply.—A long list of cases has settled the rules for the construction of documents, and one of the rules is that if the Court cannot understand an expression made use of in a document, it ought to take extrinsic evidence—*Attorney General v. Shore* (3). A will is no exception to the rule—*Shore v. Wilson* (4). Here if the Court cannot understand the expression "as commanded," it ought to take evidence—*Nightingale v. Goulburn* (5). The doctrine of *cy pres* applies.

MARKBY, J.—This is a suit brought by the plaintiffs, as trustees and legatees under the will of Nusseem Ezekiel Judah, to recover a sum of money, now in the hands of the Administrator General, which they allege to be the residue of the testator's

(1) 1 T. & R., 280.

(2) 5 Beav., 177.

(3) 7 Sim., 309.

(4) 9 Cl. & F., 356.

(5) 5 Hare, 484; S. C., 2 Phil., 594.

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estate, and which they claim under the following clause in the testator's will:—"And what may remain, after payment of the above mentioned sums as well as all the debts, shall remain under the control of my brother, Sassoon Ezekiel Judah, and my brother Joseph Ezekiel Judah, for the purpose of defraying there-with the expenses for the year, and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their judgment."

I divide this bequest into two parts. I think that down to the word "commanded" the testator is speaking of the expenses and charitable distributions which the witnesses say are considered necessary according to the tenets of their religion, and which are confined to the first year after the testator's death. In the remainder of the sentence he is, in my opinion, speaking of such giving of alms after the year has expired as (though not necessary) is beneficial to the soul of the testator.

The defendants all contend that the bequest fails. They are not agreed as to what becomes of the residue if this be so held, but that question is not now before me.

It has been held here, and for the purposes of this case I adopt that holding, that the English rule of law which prohibits, the bequest of money to superstitious uses has no application in this country.

It has also been assumed, on all hands, in the course of this argument, and for the purposes of this case I assume it also that because the English Court of Chancery departs from its ordinary rules where charitable bequests are concerned, and undertakes to see them carried into execution however indefinite they may be, this Court should do the same under similar circumstances.

Notwithstanding these wide assumptions however in favor of the bequest, I still think that part of it which appropriates the residue to giving alms for the testator's spiritual benefit ought not to be considered valid. This is not a purely charitable bequest. The ultimate object of the bequest is the testator's own spiritual benefit. If, therefore, the bequest were to be held valid, this Court, in performing its duty of superintending the administration of the trust, would have to try every appli-

cation or proposed application of the funds by two distinct tests. It would have to ascertain, first, whether it was "a giving of alms," and secondly, if it was such a giving of alms as would be for the testator's spiritual benefit in accordance with the doctrines of the Jewish religion. We have, therefore, a vague bequest, with a vague restriction upon it. Whether or no, if this Court were to make the attempt, it could ascertain what giving of alms would, and what giving of alms would not, be for the testator's spiritual benefit, I am hardly in a condition to say. But as I understand the English cases, that is not the kind of inquiry which even the English Court of Chancery will undertake, and if it would not be undertaken there, I should certainly say it ought not to be undertaken here.

Whether or no the bequest is valid, so far as it relates to the expenses and charitable distributions within the year which, under the Jewish religion, are said to be considered necessary, is a point which does not arise in this case; and I wish it to be clearly understood that I express no opinion upon it. I think that, for the decision of that point, other principles would have to be taken into consideration than those which are involved in the case before me.

All I now hold is that, so far as the bequest to the plaintiffs relates to giving of alms for the testator's spiritual benefit, it is void for uncertainty; that so far as it relates to other matters, they were all to be performed within the year of his, the testator's, death, which year has expired. The plaintiffs, therefore, cannot claim the fund now in the hands of the Administrator General, and the suit will be dismissed. The costs of all parties as between attorney and client will be paid out of the fund on scale No. 2.

Judgment for defendants.

Attorney for the plaintiffs: Mr. Carapiet.

Attorney for Ongshooproakash Gangooly, guardian for the infant defendants, A. H. N. E. Judah and F. N. Judah: Baboo W. C. Bonnerjee.

Attorney for the Administrator General: Mr. Dover.

Attorney for Sarah Belilios: Mr. Moses.

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[APPELLATE CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice, L. S. Jackson, and Mr. Justice Glover.

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July 12.

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AND ANOTHER (DEFENDANTS).

THE COURT OF WARDS (ONE OF THE DEFENDANTS) v. THAKUR
JIBNATH SING (PLAINTIFF).*

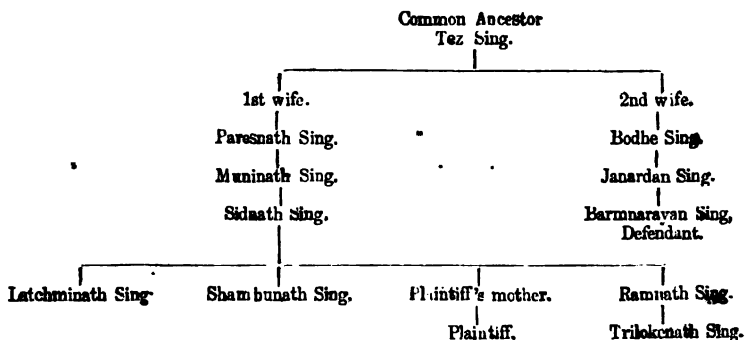
See also
15 B.L.R.192.

*Hindu Law—Inheritance—Mitakshara—Great-Grandson—Sapinda—
Gentile—Bandhu—Cognate—Father's Sister's Son.*

The great-grandson of the great-great-great-grandfather of the deceased is, according to the Mitakshara, a nearer heir to the deceased than his father's sister's son.

THIS was a suit for recovery of possession of the Raj and immoveable property in Pergunnas Ramghar, &c., on the ground of title by inheritance.

The following pedigree will show the state of the parties and the relation in which they stood to the deceased Raja Trilokenath Sing:



The defence set up was (*inter alia*) that, according to the family usage, the plaintiff was not entitled to the possession of the disputed Raj in the presence of the defendant, who was the heir and the rightful proprietor.

The Deputy Commissioner held that, according to the Mitakshara, a *sapinda* had a right to inherit before the *bandhus*; and

* Regular Appeals, Nos. 82 and 120 of 1869, from the decree of the Deputy Commissioner of Lohardagga, dated the 24th February 1869.

that as the plaintiff was a *bandhu*, and the defendant a *sapinda* ¹⁸⁷⁰ to Trilokenath, the plaintiff was not entitled to succeed. He, ^{THAKUR} JIBNATH SING ^{v.} accordingly, dismissed the plaintiff's suit.

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The plaintiff appealed to the High Court.

Mr. Mackenzie (Baboos *Kaliprasanna Dutt*, *Shamlal Mitter*, and *Mahendralal Seal* with him), for the appellant, contended that, according to the *Mitakshara*, the plaintiff was entitled to succeed to the property in preference to the defendant, and cited *Mitakshara*, Chapter II, Section 2, verse 1; Chapter II, Section 10, verse 3; Chapter I, Section 1, verse 5; *Sheo Sahai Sing v. Omed Koonwur* (1); Chapter II, Section 10, verse 2. The Judgment of the lower Court proceeded upon the hypothesis that all gentiles take before *bandhus*; but a great-grandson has no place in the line of succession—*Mitakshara*, Chapter II, Section 2, verses 1, 2; *Vivada Chintaman*!, paragraph 9; *Mitakshara*, Chapter II, Section 5; *Rutcheputty Dutt Jha v. Rajundernaraia Rae* (2); *Smriti Chandrika*, 209, verse 7.

Baboo *Kaliprasanna Dutt* on the same side.—The *Mitakshara* does not go beyond son and grandson—Chapter II, Section 5, verses 2, 4, 5. Sons do not mean all descendants, for then “their issue” would be a tautology. The word in the original for issue is *Sunava*. Reading these Sections together it would appear that a complete enumeration has been given, for the law was promulgated by the sages to avoid dispute. *Gotroja* does not mean every one born in the family. It is explained in Chapter II, Section 2, verses 4, 5. The commentary of Subhadini on the words of verse 1, Section 6, Chapter II, *Mitakshara*, distinctly gives the enumeration. This is quoted by Colebrooke and West and Buhler. The interpretation of *Putra* in *Rutcheputty Dutt Jha v. Rajundernaraia Rae* (2) is not correct. He cited *Laksmibai v. Jayaram Hari* (3), *Choutreea Run Murdun Sein v. Sahib Purlad Sing* (4), *Collector of Tirhoot v. Huro Pershad Mohunt* (5).

(1) 6 Sel. Rep. 301.

(4) 7 Sel. Rep. 292.

(2) 2 Moore's I. A., 132.

(5) 7 W. R., 500.

(3) 6 Bom. H. C. Rep., 152.

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Baboo Annada Prasad Banerjee (Baboos Mahesh Chandra Chowdry and Ramesh Chandra Mitter with him), for the respondent, contended that *Gotroja* means "sprung from the same family." The Mitakshara lays down only certain principles to regulate succession, but does not give an exhaustive list of heirs. Mitakshara, Chapter II, Section-3, verse 3: "To the nearest *sapinda*, the inheritance next belongs." Gentiles sprung from the same family are divided into two classes—those connected by *pinda* (funeral cake), and those connected by libation. Chapter II, Section 5, verse 5 gives the manner of the succession of those connected only by libation of water; the great-grandson is not mentioned in the list. There, the meaning of son is plain; the author was dealing only with the "nearest *sapinda*." But a great-grandson is a remote *sapinda*, for he offers only *pindas* to two of the ancestors of the deceased, whereas a grandson offers *pindus* to three ancestors of the deceased conferring greater benefit. Keeping in mind that the *sapindas* would succeed, the author enumerates only two in descent of each *sapinda*. The great-grandson comes in after exhausting the ascending line to the seventh degree—Grady's Hindu Law, page 227. The father, grandfather, and great-grandfather, are the nearest *sapindas*. The other ancestors are partakers of the *lape* (or wipings of the *kusa* grass). The grandfather's son can offer *pinda* to his grandfather, great-grandfather, and great-great-grandfather. The great-grandfather's son offers *pinda* to his great-great-great grandfather. But the great-grandson of the grandfather would offer *lape* to the great great-grandfather. In *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (1), it has been held that the list of *bandhus* is not exhaustive—citing Parasara Madhava. This shows that only the principle had been laid down. Yajnavalkya himself declared that the gentiles would take before cognates. Chapter II, Section 3, verse 3, Mitakshara, adopts the principles of Menu. The brother of the whole blood takes before the brother of the half blood. Whether the word *pinda* means "funeral cake" or "body," the principle is not altered. First the gentiles would take, then the cognates. The plaintiff is only a cognate, whereas the defendant

is a gentile. Menu, Chapter V, verse 6 defines a *sapinda*. Menu, Chapter IX, verse 186: The word "son" as used in the Mitakshara is a generic term, meaning "descendants:" see note to verse 3, Section I, Chapter I, Mitakshara. He then cited 1 Strange's Hindu Law, p. 145; 3 Colebrooke's Digest page 33; *Shoodhyan v. Mohan Panday* (1), *Duroo Sing v. Bai Sing* (2), and *Agur Singh v. Ram Singh* (3).

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Baboo Kaliprasanna Dutt in reply.

The judgment of the Court was delivered by

COUCH, C. J.—This is an appeal from the decision of the Deputy Commissioner of Lohardagga, dismissing the plaintiff's suit with costs. The suit was brought to obtain possession of the Ramghar estate, as heir to Trilokenath Sing deceased. The plaintiff is the son of the sister of Trilokenath's father, and the defendant, Barmnarayan, is the great-grandson of the great grandfather of the grandfather of Trilokenath; and the main question which has been raised in this appeal is, whether the plaintiff is under the law contained in the Mitakshara, the heir to the deceased Trilokenath, in preference to Barmnarayan, it being assumed that, by the custom of the family, the defendant, Maharani Hiranath Kumari, the mother of the deceased, is incapable of inheriting. The argument for the plaintiff has been rested upon the interpretation, which it is contended should be put on the 5th Section of the 2nd Chapter of the Mitakshara; and it is said that in that section the author refers to the text in Section 1, verse 2, and enumerates the heirs; and that only those are gentiles (*Gotrajas*) who come within the scheme of Section 5, by which it is said the collateral succession is limited to the grandson of the common ancestor, the degrees being reckoned in the direct line, and on failure of these the cognates succeed. Thus Barmnarayan, who is a great-grandson of the common ancestor would be

(1) S. D. A., N. W. P., 1863, 134.
(2) *Id.*, 1864, 521.

(3) 2 S. D. A., N. W. P., 1865, 4.

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excluded ; and the plaintiff, who is the nearest cognate, entitled to the inheritance.

Before noticing the decided cases upon the point, we think we had better consider the text of the Mitaksbara.

In Chapter II, Section 1, verse 2, the rule of Yajnavalkya is given : " The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all (persons and) classes."

In Section 5, the author having, in the previous sections, commented on the right of the wife, the daughters and the daughters' sons, the parents and the brothers, proceeds to comment on the succession of the *gotrojas*, or gentiles. In the first place the paternal grandmother takes the inheritance, and on failure of her " the paternal grandfather, the uncles, and their sons"—(Section 4) : " On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons, and their issue inherit"—(Section 5.) It is argued that the author thus limits the inheritance to the grandsons of the paternal grandfather and paternal great-grandfather ; and that the words which follow—" In this manner up to the seventh degree must be understood, the succession of kindred belonging to the same general family,"—apply the same rule to the descendants of remoter ancestors. If this be the interpretation, the author of the Mitakshara does not expound the text of Yajnavalkya by stating the order in which the *gotrojas*, or gentiles, are to succeed, but he makes a different rule of succession by which some of them are altogether excluded from the inheritance, the text of Yajnavalkya being that, on failure of the gentiles, the cognates (the next in order) are to succeed.

It is reasonable to suppose the author intended to state the order of succession among *gotrojas* rather than to introduce a different rule ; and it has been suggested in the argument for the respondent that the making the enumeration in the collateral line cease at the grandsons is explained by the offering

of funeral oblations. It is argued for the respondent that as the *sapindas* are of two grades, the nearer who offer and partake of *pinda* (the rice ball) entire, and the remoter who offer and partake of merely the wipings of the hands. The author, keeping in mind the text he had before cited in Section 3, verse 3, and Section 4, verse 5: "To the nearest *sapinda* the inheritance next belongs," enumerates the *sapindas* in the order of propinquity, omitting the great-grandsons of the father, of the paternal grandfather, and of the paternal great-grandfather, because they are remoter than the kindred he mentions. And the passage in Subhadini translated in the note at page 144, West and Buhler is consistent with this. It is "on failure of the father's line, the line of the father (must be understood to) end with the brothers and their sons," which may mean for the purpose of determining who are the nearest *sapindas*. It cannot be supposed that it was intended entirely to exclude the father's great-grandson, and that the inheritance should go to another family.

That the 5th section was not intended to be an exhaustive enumeration of the *gotrojas*, but only a statement of the order in which they would take seems to be the interpretation which is consistent with the text which was being expounded, and with the ruling principle of the Hindu law of inheritance, and ought to be preferred. But the question is really settled by the decision in *Rutcheputty Dutt Jha v. Rajundernarain Rae* (1). It was there held that, by the Hindu law in force in Mithila, the party in possession being descended in the sixth degree in the paternal line was to be preferred to the maternal line. At the close of the judgment it is said that the Mithila law was against the claim of any relation on the mother's side till those on the father's side to the seventh degree have been exhausted. Some of the authorities quoted in that case, the Vivada Chintamani, and Vivada Chandra, for instance, do not belong to the Benares school, by the law of which the case before us is governed; but this is not a point upon which there appears to have been a

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(1) 2 Moore's I. A., 133.

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difference between the Mithila and Benares schools. In *Mussa-
mut Dig Dayi v. Bhatan Lal* (1), it was held by Mr. Justice
(1) Before Mr. Justice L. S. Jackson and
Mr. Justice Mitter.

MUSST. DIGDAYI AND OTHERS (PLAIN-
TIFFS) v. BHATAN LAL, *alias*, BHATU
LAL AND OTHERS (DEFENDANTS).*

The 14th May 1869.

Mr. Montrieu (with him Mr. R. E.
Twisdale and Baboo Hem Chandra
Banerjee) for appellants.

Mr. Paul (with him Baboos Anukul
Chandra Mookerjee, Srinath Dass, and
Nil Madab Sein) for respondents.

JACKSON, J.—This case was before
us on the 17th of November last, and
we sent it down to the Principal Sud-
der Ameen, in order to his trying an
issue of fact which had been preter-
mitted. He has now returned his
finding, and that finding is in favor
of the defendant; that is to say, he
reports to us, upon the evidence, that
the defendants are descended in the
degree in which they state themselves
to be from Bhawani Sing, the
common ancestor of the plaintiffs and
the defendants. The evidence, upon
which that finding has been based,
has been read to us and commented
upon by the learned Counsel for the
appellant.

The learned Counsel has very can-
didly admitted the difficulties with
which he has to contend in this case,
and his comments, I think, have
been of a very fair and proper
character. At the same time I am
bound to say that upon those points
on which both parties have given

such evidence as they had to adduce,
it seems to me that the evidence
is all one way, and that the testimony
of the witnesses on the defendant's
side, is, generally speaking, wholly
unimpeached. It comes, in a great
part, from persons who were relations
of the family, and their credit is in no
way attacked. There are, as it is
inevitable there must be, certain in-
accuracies and discrepancies in points
of detail of a lengthy pedigree which
they undertook to set out; but the
principal fact still remains that the
defendants, who are eleven persons, are
sworn to have descended from Bhawa-
ni Sing who is also the ancestor of
the plaintiffs through the maternal
line, and that no effort whatever has
been made to show who, if not Bhaw-
ani Sing, was the progenitor of all
these persons. In that state of things
we cannot hesitate for a moment to
say that the defendants have made out
the descent which they claimed.

That being so, we have to enquire
what the rule of Hindu law appli-
cable to such a case is. I confess that
I feel myself very much comforted
and assured by the presence in this
case of Mr Justice Mitter, but even
if it were not so, the language of the
Mitakshara, Chapter II, section 5, claus-
es 5 and 6, and section 6, clause 1,
appears to be perfectly unmistakable.
The 5th clause of section 5 says,
"On failure of the paternal grand-
father's line, the paternal great-grand-
mother, the great grandfather, his sons
and their issue, inherit. In this
manner must be understood the suc-
cession of kindred belonging to the

* Regular Appeal, No. 332 of 1867, from a decree of the Subordinate Judge of
Zilla Patna, dated the 27th August 1867.

L. S. Jackson and Mr. Justice Mitter, that gentiles must be exhausted before the cognates can succeed. There are several decisions in the North-Western Provinces upon the law according to the Benares school. In *Duroo Sing v. Rai Sing* (1), it was held that though the great-grandson of the paternal great-grandfather of the last male owners are not expressly enumerated by Sir W. Macnaghten as heirs according to the law as current in Benares, yet they are entitled to inherit. In *Agur Singh v. Pam Singh* (2), it was also held that, in the tracts governed by the Benares law, a great-grandson is included among near heirs, and several previous decisions to the same effect are quoted at page 11. In that case both the claimant^s and the deceased appear to have been in the fifth degree from the common ancestor. There is another decision in the same Court—*Shoodhyan v. Mohan Panday* (3).

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In the Bombay Presidency, the same construction has been put on the Mitakshara, and the series has been considered by the shastrees as not exhaustive, nor intended to exclude to others than those named, but only as an exemplification of the general doctrine—Digest of Hindu Law by West and Buhler, Book I, page 137. It was also recognized as the law under the Mitakshara in *Rany Srimuty Debeah v. Rany Koond Luta* (4). We are, therefore, clearly of opinion that the appellant is not entitled to the inheritance in preference to the respondent Barmnarayan, and that the decision of the lower Court on this point is right. As regards that part of the case which is described in the plaint, and

same general family and connected by two very simple texts that we must exhaust the gentiles before the cognates can succeed. I think, therefore, that the plaintiff's case wholly fails, and that the judgment of the lower Court must be affirmed with costs.

beyond the kindred connected by funeral oblations of food, or else, as far as the limits of knowledge as to birth and name extend:" and in

section 6, clause 1, it is said:—"On failure of gentiles, the cognates are heirs." It is quite clear from these

MITTER, J.—I am of the same opinion.

(1) S. D. A., N. W. P., 1864, 521.

(2) *Id.*, 1865, 4.

(3) *Id.*, 1863, 134.

(4) 4 Moore's I. A., 292.

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is called in the grounds of appeal the constitution of an heir by appointment, we need only say that taking the evidence of Maharani Prem Kumari to be entirely true, there was no adoption nor anything which would, by Hindu law, alter the status of the plaintiff, and give him any other right of succession than he had as the father's sister's son. The question between the Maharani and the defendant Barmnarayan is the subject of another suit. As between the plaintiff and Barmnarayan, the decision of the lower Court is right, and the appeal must be dismissed with costs as against the second and third respondents, but without costs as against the first respondent, the Court of Wards.

In No. 120 of 1869, the Court of Wards has appealed solely on the question of the amount allowed for costs. This is a matter in which we think we ought not to interfere, and that appeal must be dismissed without costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Mr. Justice Macpherson.

1870
Feb. 1.

S. M. KAMINI DEBI v. RAMLOCHAN SIRKAR.

Redemption, Equity of—Purchase by Mortgage—Mortgagor and Mortgage—Trustee.

K. D., a Hindu widow, by deed appointed R. S. to be her general mooktear, for the conduct of certain suits in her name, which were pending in respect of the estate of her deceased husband. By this deed, dated September 25th, 1858, she covenanted to repay him, within two months of the successful termination of the suit, "all moneys properly disbursed by him on her account, &c;" and also to pay him an additional sum as remuneration to himself. R. S. entered on the conduct of her business, and advanced certain moneys on her account, and in October, 1859, K. D. executed in his favor a second deed by which she mortgaged to him her share in the estate of R. H., deceased, which was in the hands of his executors, "and my "decrees 24 and 25 in the Zillah Court, and the decree in the Supreme Court "and the right and interest of all the said decrees and all other real and personal "properties belonging to the said estate." By a decree of the High Court of 28th July 1862, in one of the suits brought by K. D., the estate of R. H. was declared to consist of a share of a certain talook, of a share of a house in Calcutta, and of a certain sum of money; and K. D. was declared to be entitled

to one moiety thereof. K. D. afterwards obtained an order for possession, and held possession of the said talook until August 1866. R. S. continued the conduct of K. D.'s business, and advanced more money on her account, in respect of which on May 31st, 1865, he brought a suit against her, and on September 21st 1865, obtained a decree in his favor. Under this decree he attached the right, title, and interest of K. D. in the estate of R. H.; and on 25th June 1866, it was put up for sale, and purchased by R. S. himself. In a suit brought by K. D. against R. S., among other things, for an account, *held*, that R. S. was a trustee for K. D., in respect of her share in the estate of R. H., which he had purchased in execution of his decree.

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A mortgagee cannot, properly, in execution of a simple decree for money, the repayment of which is secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged; but if he do so, and purchase in himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title.

THIS suit was brought by Kamini Debi *in formâ punperis* to set aside, as having been fraudulently obtained, a decree of this Court, dated the 21st September 1865, to re-open certain settled accounts, and to take an account of all sums received by the defendant for the plaintiff, and of all sums due from the plaintiff to; the defendant, under a certain deed of the 25th September 1858 to have it declared that the defendant held an eight-anna share in a certain estate, known as Talook Abad Ramlochanpur, as a trustee for the plaintiff; to ascertain the damages sustained by the plaintiff by reason of the defendant's having committed various breaches of the agreement contained in the deed of the 25th September 1858; and to obtain an order that the defendant do pay such damages, and do specifically perform the agreement so far as it remains to be performed.

Mr. Kennedy and Mr. Piffard for the plaintiff.

Mr. Marindin and Mr. Branson for the defendant.

In 1858, the plaintiff was deeply immersed in litigation connected with the estate of her deceased husband, Nilmani Haldar. The principle suit was one in the Supreme Court for the administration of the estate of Ramchandra Haldar, her husband's father; and in that suit, a decree for an account had been made. There were also some other suits pending in the Court of the 24-Pergunnas, and relating to the estate of Ramchandra

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Halidar. The plaintiff's attorney in the suit in the Supreme Court was Mr. W. F. Gillanders, who is also her attorney in the present suit. That suit was in the first instance managed for Kamini Debi, and carried on with funds supplied by one Sarada Prasad Mitter, who however disappeared from the scene in 1858, when upon a charge of forging and uttering made against him by Kamini, he was committed for trial at the Sessions, where he was afterwards convicted and sentenced to transportation. Kamini being herself without means, recourse was then had to the defendant, Ramlochan Sirkar, who, after some negotiation, was appointed her general mooktear for the conduct of all her suits, and under took to supply her with funds for carrying on the same; and a deed was executed by her to that effect.

By this deed, the plaintiff covenanted to pay back to Ramlochan, within two months after the successful termination of the suit, "all moneys properly disbursed by him on her account for "costs of suit, maintenance or otherwise, with interest at 12 per "cent." and also to pay to him an additional sum of rupees 18,000 by way of remuneration for his labor and trouble in the management of her said several suits and affairs and business. The deed concluded by the parties binding themselves in a penalty of rupees 50,000 to carry out its terms. The deed was executed by Kamini Debi on the 25th September 1858, in the presence of Mr. Gillanders, who explained it to her, and who signed it as an attesting witness.

Ramlochan immediately entered upon his duties, and expended considerable sums on Kamini's behalf. This appears from a Bengali mortgage deed which Kamini executed about a year afterwards. This deed was dated the 28th of October 1859. It recited the agreement entered into in 1858; and that in pursuance thereof, Ramlochan had already paid rupees 9,416 on Kamini's behalf. It then continued:—"Whatever expenses, agreeably to the conditions of the said agreement, either you or your representatives will pay on my account up to the time of the termination of my cases, and whatever expenses you have been paying and will pay, for such of my cases as are now pending, and for my monthly allowance, &c., and rupees 18,000 which I have agreed to pay you as your reward agreeably to the terms of the said agreement;

for all these sums of money, which I have no other means to repay, I mortgage to you the estate of my father-in-law, the late Ramchandra Haldar, which is in the hands of the executors, and my decrees, Nos. 24 and 25, in the Zilla Court, and the decree of the Supreme Court, and the right and interest of all the said decrees, and all other real and personal properties belonging to the said estate whatever then connected therewith in any place, with these conditions :—From this day the entire property connected with the estate of Ramchandra Haldar, and the right and interest in the said decrees, and the right and interest in such decree as may be obtained hereafter in my favor, whatever right I have now and shall have hereafter, I relinquish ; and you and your representatives are vested with the right thereof. Then Kamini declared that she should have no power to intermeddle in any way with any of the property mortgaged ; and that until Ramlochan's money was paid up, she should not be able to make a gift or sale or mortgage to any other person of any part of the property; after which came the following passage :—" On the termination of all the business of the said decrees and the present case, whatever property is obtained by me, will come to the hands, and continue in the possession of you and your representatives to which I will raise no objections. When all the property, after the termination of all my cases, comes to the hands and possession of yourself or your representatives, I or my representatives will, within three months settle all the accounts of the aforesaid money and of what is hereafter expended, pay the same, together with the interest and the amount of the said reward, and take back this mortgage deed, together with the estate. Should I not pay within the said period, then whatever of my estate remains and comes into your hands, you will of your own power out of the Court (i. e., without having to come to the Court) sell either by private or public sale, and realise the whole of your money. If the money expended by you be paid up by the sale of some portion of the estate, then whatever portion of the estate remains will be divided into two equal portions between us, that is, I will, get, and you will give me one eight-anna share, and the other eight-anna in lieu of your reward rupees of 18,000

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1870 you will take, and I will give." This deed of mortgage also
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After a variety of proceedings, by a decretal order of the High Court of the 28th July 1862 made in the administration suit, the estate of Ramchandra Haldar was declared to consist of a share of Talook Abad Ramlochanpur, of a share of a house in Calcutta, and of a certain sum of money, and it was declared that Kamini Debi was entitled, as a Hindu widow, to one moiety of the estate of Ramchandra Haldar, after payment of debts and legacies, &c. It was also declared that Bindubasini Debi (a defendant in the suit) was a trustee for the estate of Ramchandra Haldar of the said Talook Abad Ramlochanpur; and it was ordered that the estate of Ramchandra, including the talook, should be sold by the Court, and the proceeds brought into Court, and further that the receiver of the estate should be continued.

Under this decree the receiver was unable to get possession of the talook; and no final decree in the administration suit was ever made. There had however been considerable further litigation concerning the talook in the Courts of the 24-Pergunnas and the appellate side of this Court. In one suit the receiver joined Kamini Debi in suing for possession, and got a decree. As the receiver was afraid of an appeal to the Privy Council, he refused to execute the decree and take possession. An application for possession was thereupon made to the Court by the defendant in the name of the plaintiff; and this application being successful, possession was obtained on the 11th February 1866, and was held until the 20th August 1866 in Kamini's name.

From September 1858 to June 1867 (if not up to a later date), Ramlochan Sirkar paid the plaintiff her maintenance at the rate of rupees 30 a month, and he also paid to her mooktear. Ramchandra Mazumdar (who had him in her employment before, and from the time of the agreement of 1858), his wages at Rupees 20 per month, also he paid (as the plaintiff states) rupees

12,734-12-9, and also certain small sums of money for conveying bills to Mr. Gillanders, besides money expended by him in the conduct of the suits in the Mofussil Courts.

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During this period, Ramlochan Sirkar from time to time rendered his accounts to Kamini Debi, and these accounts were signed by her as correct. One of the latest of these accounts was signed by her, and acknowledged by her to be correct, in the presence of her attorney, Mr. Gillanders. As to this the plaintiff says:—"The said papers (i. e., the accounts rendered from time to time) were formally read and explained to your petitioner (Kamini Debi), but she had no means or power of ascertaining their correctness, and only signed them under the influence of the defendant, or his son, Srinath Das; and in consequence of her reliance upon them, and on the representation and assurance of the defendant and his said son that the said account was correct, and under such influence, and by the direction of the defendant, she desired her solicitor (whom the defendant on one occasion had accompanied to her house) to attest her signature to some of the said papers, and before such attestation represented to him that the said papers were correct, and had been examined by herself and her brother, who was also dependent upon the defendant."

On the 31st of May 1865, the defendant, Ramlochan Sirkar, instituted a suit in this Court against Kamini Debi for the recovery of rupees 56,251-8-2, which he claimed to be due under the agreement of 1858; and on the 21st September 1865, a decree for that amount was given in his favor.

Under this decree, Ramlochan attached the right, title, and interest of the plaintiff in Talook Abad Ramlochanpur, and had it put up for sale on the 25th June 1866, when he himself purchased it for rupees 10,000, the purchase-money not being actually paid by him, but the amount being written off as in part satisfaction of the decree.

Subsequently, Ramlochan Sirkar, in further execution of the decree, attached Kamini Debi's right, title, and interest under the decree in the administration suit, and had it advertised for sale. But on the 25th September 1867, an injunction was issued by Mr. Justice Norman restraining him from proceeding with this sale.

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The defendant having at the sale held in execution of his own decree, purchased the plaintiff's rights in Talook Abad Ramlochanpur, got an order for possession as purchaser, and had ever since held an eight-anna share of the property as in his own right, and had refused to give possession to the Receiver, and had resisted and thwarted various attempts made by him to get possession, and the estate of Ramchandra Halder had suffered greatly in consequence. The Receiver, however, had been for sometime in possession of the other eight-anna share.

The prayer was "for an account of all moneys received by the defendant, by virtue of the agreement of September 1858, or otherwise as agent or trustee for the plaintiff, or under his alleged purchase of Talook Abad Ramlochanpur, and of all moneys properly paid by the defendant, to or on behalf of the plaintiff; that the Court would assess and order payment of the damages sustained by the plaintiff by reason of the defendant's breaches of his agreement of 1858 and otherwise; that the accounts signed by the plaintiff might be set aside as fraudulent and void; that the decree obtained against the plaintiff by the defendant might be declared fraudulent and void, and that he might be restrained from executing it; that the defendant might be ordered to deliver up possession to the receiver, and might be declared a trustee thereof for the plaintiff, subject only to his right and interest therein under the said deed of the 25th September 1858, as a security for any monies which might be due to him thereunder; that what was found due from the plaintiff to defendant might be set off against what was due from the defendant to the plaintiff; and that the balance (if any) due to the defendant might be paid out of the moneys to the plaintiff in the administration suit; and that the deed of the 25th September 1858 might be performed and carried into execution."

The plaint was not in form a plaint, but was merely a petition for leave to sue as a pauper, which petition was registered and deemed the plaint in the suit, in accordance with the provisions of section 308 of Act VIII of 1859.

In the plaint the mortgage deed of October 1859 was not expressly referred to, either in the prayer or elsewhere. But towards the end of the paragraph, in which the agreement of 1858 was set forth (which paragraph was prefaced by a statement that the

plaintiff did not possess a copy of the agreement, and therefore could not give its terms with precision), the following statement was made :—" And your petitioner saith that, as security for the " payment of all such sums, she assigned to the defendant, by way of " mortgage, the said suits and the decrees then made therein, and " her interest therein, and gave him full power for her and in her " name to recover and receive the properties and all sums of money " to be awarded to her in the said suits, and in the first instance " thereout to recoup himself, and make over the balance to her."

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The third issue, the only one material to this report, was as follows :—

3. Whether the sale at which the defendant purchased the plaintiff's right, title, and interest in Talook Abad Ramlochanpur is valid, having been had at the suit of the defendant, in satisfaction of a decree for a debt for which that identical property was mortgaged to the defendant; or whether the defendant is not now a trustee of so much of the talook as he purchased for the plaintiff, subject to the defendant's lien, &c., under the deeds of 1858 and 1859.

MACPHERSON, J. (after detailing the facts as above, continued).—Mr. Marindin objected to the questions which I have embodied in the third issue being raised, on the ground that they are not raised in the plaint, and on the ground that, as the plaint is based wholly on charges of fraud, the plaintiff should be held strictly to the case made in it.

It is quite impossible to say that the issue is properly raised in the plaint, or that the question involved in it was present to the mind of the person who framed the plaint. Nevertheless, I allowed the issue to be raised, and I think that, is under the circumstances I was right in so doing. The question is purely one of law arising on the face of the plaintiff's statement of her case, and it is not a new question as between these parties, having been discussed on the application for an injunction made to Mr. Justice Norman in September 1867, and a strong opinion upon it having then been expressed by that learned Judge (1).

(1) See *post*, page 460.

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As to this issue, I am of opinion that the defendant must be declared to be a trustee for the plaintiff as regards the eight-anna share of the Talook Ramlochanpur purchased by him in execution of his decree.

Without saying that an equity of redemption can never be seized and sold, I have no doubt that a mortgagee cannot properly, in execution of a simple decree for a sum of money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, and that a mortgagee who attaches and sells his mortgagor's equity of redemption, and purchases it (directly or indirectly) himself, is a trustee for the mortgagor, and cannot acquire an irredeemable title against him.

It is true that the Court of Chancery will not as a rule prevent a mortgagee from pursuing all his remedies at once. But in England, an equity of redemption cannot be seized and sold, and the collateral remedies open to the mortgagee can be only proceedings against securities, or against the person or against the property, other than the equity of redemption of the mortgagor. The fact therefore that, according to English law, all the remedies may be pursued at once, does not show that, if there were in England a general power of attaching and selling an equity of redemption, such as there is in this country, a mortgagee could, in the exercise of that power, sell and purchase his mortgagor's equity of redemption. On the contrary, the whole tendency of the English law is against such an inference. It is undoubted law that, when a mortgagee has a power of sale, if he sells in exercise of that power, he cannot himself purchase, that is to say, if he does purchase he will be declared to be merely a trustee for the mortgagor. The mortgagee who sells (except where in judicial sales he obtains leave to bid as his trustee), is not allowed to purchase the mortgaged estate—*Downes v. Grazebrook* (1).

No doubt, and this is Mr. Marindin's strongest point, a second mortgagee, even though under his own security he be a trustee for sale, may buy from the first mortgagee selling under his power, and may in all respects acquire an irredeemable title as

(1) 3 Mer., 200.

if he were a stranger to the estate, provided he has not availed himself of his position to obtain an undue advantage in the purchase, or otherwise acted *malâ fide*—*Shaw v. Bunny* (1). Even in that case, however, the Lord Justice Turner expressed his very grave doubts as to whether it was properly held that the mortgagee could divest himself of his character of mortgagee, and his remarks on the subject are well worthy of consideration.

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But the case of a second mortgagee buying from a first mortgagee who sells under a power is quite different from the present case. A second mortgagee has no connection with the first mortgagee, and when he purchases, is a stranger, so far as that mortgage is concerned. But in the present case, the mortgagee purchased at the sale brought about by himself, in order to realise the debt for which the property was under mortgage to him. It is one thing to buy at a sale held by a third party in satisfaction of a prior mortgage; it is another to buy at a sale held at a suit of the purchaser himself, in execution of a decree which he has obtained for money as security for which the property sold is under mortgage to him.

I have myself repeatedly refused to permit a mortgagee to sell the equity of redemption of his mortgagor, in satisfaction of a simple money decree, for the amount secured by his mortgage; and I have seen, on the appellate side, very striking practical examples of the evil consequences of allowing such sales. It is, in fact, a not uncommon trick to deprive the mortgagor of his property through the means of such sales. No one will ever give a fair price for an equity of redemption, when the mortgagee is present himself as a bidder, and giving notice of his claims as mortgagee. The equity of redemption in such a case is knocked down to the mortgagee for a small sum which is carried to the mortgagor's account, in part satisfaction of the decree, and the property vests absolutely in the mortgagee, who then at his leisure proceeds to further execution of his decree, in order to realise the balance remaining due under it.

One view of the matter is that, when the mortgagee purchases, the mortgage debt is satisfied. But, I think that the more correct view is that the mortgagee purchasing is a trustee for the mort-

(1) 33 Beav., 494.

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gagor who still has the right to redeem. Mr. Justice Phear has lately expressed a similar opinion, in the case of *Bolanauth Koondoo Chowdry v. Govindomoye Dossee* (1); and although he did not actually decide the question, Mr. Justice Norman took the same view of it, when the application for an injunction was argued before him, and his observations on the point in his judgment of the 26th September 1867 are very pertinent (2).

(1) 3 B. L. R., O. C., 83.

(2) Before Mr. Justice Norman.
RAMLOCHAN SIKKAR v. SRIMATI
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Sept. 26th, 1867.

THIS was an application by the defendant, for an injunction to restrain the plaintiff from proceeding to sell certain property, under an order of Court dated July 4th, 1867. The plaintiff was mortgagee of the property in question, which ad been mortgaged to him by the defendant.

Mr. Kennedy for the defendant.

The Advocate-General *contra*.

NORMAN, J. (after stating the facts).—The Advocate-General contends that a mortgagee, having obtained judgment on the covenant in a mortgage deed, can, in execution of that decree, put up for sale the equity of redemption of the mortgagor, and he referred to a case of *Toyluckomohun Tagore v. Gobind Chunder Sen* (a), decided by Mr. Justice Wells. I may observe that the case referred to was reversed on appeal. Mr. Hyde in a note says that the judgment, as regards the construction of Act VI of 1855, was not disturbed. But my own recollection of the matter is that the judgment of the Court of Appeal rested on the narrow ground, which was sufficient to enable the Court to reverse the judgment of the Court below, and so to prevent the injustice which, as Mr.

Justice Wells himself points out, resulted from his decision.

The Court did not find it necessary to go into other and more difficult questions, which it would have been necessary to consider before they could have upheld the judgment in favor of the defendant. I do not mean to say that an equity of redemption in a chattel may not be liable to sale under section 205, or that it may not be attached under section 234, or that a person who is under no special obligations to the debtor, in respect of such property, may not sell it, as he would any ordinary chattel.

In the case before the Court, the plaintiff is a mortgagee. He holds the property as a pledge for the payment of the debts due to him. Courts of Equity will watch closely to prevent a mortgagee from making any unfair use of his position to the prejudice of his debtor; they will not allow a person, standing in the relation of mortgagee, to take advantage of the necessities of the debtor to obtain any collateral advantages beyond the payment of the principal, interest, and costs. They will even let a man loose from an express agreement made by him to render a mortgage irredeemable.

Mortgage deeds often contain powers of sale. Lord St. Leonards says:—"This power of sale in a mortgage, is of the nature of a trust; the mortgagee like any other trustee, is bound to use all the means in his power to get the fairest and best price for the property." Lord Eldon, in *Downes v. Grazebrook* (b), says:—"He is bound to bring the estate to the hammer under every possible advan-

(a) 1 Hyde, 289.

(b) 3 Mer., 208.

• As to the case of *Toyluckmohun Tagore v. Govind Chunder Sen* (1), it contains no decision of the point by the Appellate 1870

"tace to his *cestui qui trust*." Vice-Chancellor Knight Bruce, in *Matthie v. Edwards* (a) says:—"A mortgagee, having a "power of sale, cannot exercise it in a "manner purely arbitrary, but is bound to "exercise it with discretion; not to throw "away the property, but to act in a "prudent and business-like manner, with "a view to obtain as large a price as "may, fairly and reasonably, with due "diligence and attention, be under the "circumstances obtainable." In the same case on appeal (b), Lord Cottenham said:—"If the power is exercised for exorbitant purposes, without a "due regard for the interest of the parties, "the Court will interfere." Vice-Chancellor Kindersley, in *Faulkner v. The Equitable Reversionary Interest Society* (c) says:—"A mortgagee has his rights; he "has a beneficial interest, and that interest "is the realizing of his security; In other "words, getting paid his mortgagemoney, "principal, interest, and any costs he may "incur,—that is his right; but this Court "will not allow him to exercise that right, "without a due consideration of the interest of the mortgagor, and undoubtedly the interest of the mortgagor to "which, in my opinion, the mortgagee is "bound to attend, requires that the sale "shall take place as beneficially to the "mortgagor, as if the mortgagor were "himself selling the property." A similar opinion was expressed by Lord Justice Turner in *Marriott v. The Anchor Reversionary Company* (d).

The principles laid down in these cases were acted upon in *Orme v. Wright* (e), *Ord v. Noel* (f), *Hobson v. Bell* (g); by the

- (a) 2 Coll., 480.
- (b) 16 L. J. Ch., 407.
- (c) 28 L. J. Ch., 137.
- (d) 30 L. J. Ch., 574.
- (e) 8 Jur., 19.
- (f) 5 Madd., 438.
- (g) 2 Beav., 17.
- (h) 26 L. J. Ch., 830.

Lords Justices in *Davey v. Durrant* (h); by Stuart, V.C. in *Jenkins v. Jones* (i); and in *Marriott v. The Anchor Reversionary Company* (j); and in the same case on appeal (d).

If it were necessary to decide the question, I should be strongly disposed to hold that, in equity, a mortgage standing, with respect to the mortgaged property, in the position of a pledgee, and having in that capacity acquired, by his contract with the mortgagee, certain known and defined rights, and come under certain well known obligations, and especially the obligation of restoring the pledged property on payment of the debt, cannot by any voluntary act of his own, divest himself of the character of mortgagee and the obligations incident to it. He may mark out his rights as mortgagee; and in so doing, may foreclose the mortgage, or obtain a decree for sale in the usual course; but in marking out that remedy the right of the mortgagor to come in and redeem within the time usually allowed by the practice of the Court, would be secured to him. The mortgagor would ordinarily have six months allowed him, within which he might redeem. See *Parker v. Housefield* (k), *Meller v. Woods* (l), *Newman v. Selfe* (m), *Bell v. Carter* (n). In *Shaw v. Bunny* (o), a subsequent mortgagee bought the mortgaged property from a prior mortgagee who sold in exercise of a power of sale, and claimed to hold the property discharged from any right of redemption. Even in that case, Lord Justice Turner doubted the right of a mortgagor to denude himself of that character and of the obligation

- (i) 29 L. J. Ch., 493.
- (j) 30 L. J. Ch., 122.
- (k) 2 Myln. & Keen, 419.
- (l) 1 Keen, 16.
- (m) 33 L. J. Ch., 527.
- (n) 22 L. J. Ch., 933.
- (o) 33 Beav., 494.

(1) 1 Hyde, 289.

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1870 Court. Although the learned Chief Justice may have expressed^a
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 DEB which he had undertaken, and of the
 v. trust which would attach in him to re-
 RAMLOCHAN convey on payment of the money secured
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Knight Bruce, whose opinion prevailed, thought that there was in that case nothing to prevent the second mortgage from buying in the circumstances under which he bought, and retaining his purchase.

But he said that, if the mortgagee had availed himself of his position as a mortgagee to secure to himself any facility or advantage connected with the purchase, that might have made a difference,

I am certainly not satisfied that, if a mortgagee sells the equity of redemption of the mortgaged premises in execution of a decree on collateral security, he would not be divesting himself of his obligation as regards the mortgagor.

The point was adverted to before Lord Thurlow in an earlier case on this subject—*Lyster v. Dolland (a)*. The case was eventually decided, and the mortgagor let in to redeem on another ground.

In the present case the plaintiff has a mortgage extending over different properties for a floating and uncertain balance of costs, and other moneys to be advanced. He has a decree for the advance down to a particular time, when he says the suits were terminated. In execution of that decree, on an application to the Court of the 24 Pargunnas, he procured an estate of the defendant to be sold subject to his mortgage. The defendant says that the plaintiff has bought in the equity of redemption of this estate worth rupees 1,00,000 for rupees 10,000.

I am not now dealing with the plaintiff's right under that purchase. If the sale is not an extinguishment of the mortgage debt, as was suggested by the Vice-Chancellor of England, in an analogous case, the plaintiff may find that his title under it is much less secure than he supposes. He is now seeking to bring

to sale the defendant's right and interest in the decree in the administration suit which appears to constitute the entire remainder of her property. If he had sought to sell the entire decree out and out throwing in the mortgage, as the mortgagee did in the case before Lord Thurlow, the property might probably fetch a fair price. But the equity of redemption, if sold subject to the plaintiff's mortgage, with entire uncertainty as to what may be the amount of the charge which will eventually fall on it, must fetch absolutely nothing.

Suppose, a man has three estates, each worth rupees 25,000, mortgaged to him to secure a sum of rupees 40,000, the total value of the equity of redemption would, of course, be rupees 35,000. But, suppose the mortgagees sold at different sales, held at different places, the equity of redemption of each estate separately, how much, can it be supposed, would be realized by the three sales. No one can doubt that the interest of the mortgagor would be utterly sacrificed: probably the equity of redemption would go for next to nothing; indeed it would be doubtful if, under the most favorable circumstances a fifth of the value of the equity of redemption would be realized.

Holding then, as I do, that the attempted sale is fraudulent and oppressive, and a shameless abuse of the process of this Court, I have no hesitation in staying the sale by an injunction restraining the plaintiff from proceeding with the same.

I adopt the course of granting an injunction at once, because I am satisfied, from all the circumstances of the case, that, if I allowed the sale to proceed, irreparable injury would be done. The plaintiff must pay the costs of this motion.

(a) 1 Ves., 431.

concurring in the opinion expressed, and states that the question was one which it was not necessary to decide.

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I think the defendant should be declared a trustee of an eight-anna share of Talook Abad Ramlochanpur for the plaintiff, and that he should be ordered to deliver it up to the Receiver, and to account for his receipts and dealings with it during the time he has been in possession.

There will be a declaration that the defendant holds an eight-anna share of the Talook Abad Ramlochanpur, under his purchase of the 25th June 1866, as a trustee for the plaintiff, and he will be ordered to give up possession of it to the Receiver, and to account for his receipts from and intromissions with the property.

Attorneys for the plaintiff: Messrs. *Gillanders and Chunder*.

Attorneys for the defendant: Messrs. *Verannes and Bose*.

[APPELLATE CIVIL.]

Before Mr. Justice Norman and Mr. Justice E. Jackson.

GAUR NARAYAN MAZUMDAR AND ANOTHER (DEFENDANTS) v. BRAJA NATH KUNDU CHOWDHRY AND OTHERS (PLAINTIFFS).*

Mortgage—Equity of Redemption, Purchase of—Tacking, Mofussil.

1870

April 22.

In 1840, A mortgaged certain lands to B. which he had granted in patni at a rent of rupees 145. Subsequently in September 1844, A granted a fresh patni at a reduced rent of rupees 90; and on the 9th October 1844, A mortgaged the same lands to C. In 1856, C obtained a decree for the redemption of the mortgage to B., and he paid off the debt to B.; but it did not appear that he took an assignment of the mortgage for the purpose of keeping it on foot as a security against incumbrances created by A. subsequently to the date of that mortgage, and prior to that of the mortgage to himself; and in 1862, he obtained a final decree for foreclosure against A. In a suit by C. to set aside the lease of September 1844, held that it was valid and binding upon him.

Semle.—The English principle of tacking does not apply to mortgages of land in the mofussil.

* Special Appeal, No 2690, of 1869 from a decree of the first Subordinate Judge of Hooghly, dated the 9th July 1869, reversing a decree of the first Moonsiff of that district, dated the 5th March 1869.

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Baboo Ashutosh Dhur Ambika Charan Banerjee and Dwarka Nath Sen for the appellants.

Baboo Kali Prasanna Dutt and Mahendranath Seal for the respondents.

The facts of the case are sufficiently set out in the judgement of the Court which was delivered by

NORMAN, J.—On the 26th January 1840, Annada Prasad Roy, zemindar of Basudebpur, granted Kismat Basudebpur, in patni to Hari Narayan Mazumdar, ancestor of the defendant, at a rent of rupees 145-7-3 ; and on the 19th of September 1844, he granted a fresh patni, at a reduced rent of rupee 90, being a remission of rupees 55-7-3 from the former jumma.

The plaintiff sues to set aside the lease of September 1844, by which the patni rent was so reduced.

The plaintiff's title is as follows :—

In September 1840, Annada Prasad Roy, by a deed in the English form, mortgaged the zemindari of Basudebpur, with other property, to Nabakrishna Sing. On the 9th of October 1844, Annada Prasad Roy mortgaged the same lands to the plaintiff. The plaintiff brought a suit ; and in 1856 obtained a decree for the redemption of the mortgage of September 1840. He paid off that mortgage ; but on the record before us, there is nothing to show whether he took an assignment of it for the purpose of keeping it on foot as a security against incumbrances created by the mortgagor subsequently to the date of the first mortgage, and before the date of the mortgage to himself in October 1844. The plaintiff, after paying off the mortgage of 1840, obtained a final decree for fore closure as against Annada Prasad in July 1862.

The lower Appellate Court reversing the decision of the first Court, has declared the patni lease of September 1844 not binding on the plaintiff, and therefore decreed the suit in his favor.

From this decision the defendant appeals.

It has been properly observed, by Baboo Ashutosh Dhur in the argument, that the patni lease of September 1844 was valid

as against the plaintiff, and as against the other incumbrancers holding under titles acquired from Annada Prasad subsequently to the date of that lease, which, with interest, are of very large amount, say rupees 2,00,000 at the least; and that the defendant would have been entitled to redeem Nabakrishna's mortgage for the purpose of protecting himself. I think that argument is well-founded. There is nothing to shew that the grant of the patni lease of 1844, by which the rent was reduced, was not a perfectly honest and fair transaction. There is nothing to shew, or raise the least suspicion, that the reduction was made for the purpose of defrauding persons who were to become creditors of Annada Prasad as subsequent incumbrancers. The reason for the reduction recited in the lease is that the assets had become diminished. The lease was only impeachable so far as it might tend to affect the interests of Nabakrishna as prior incumbrancer. As between the defendant and Annada Prasad, or as between the defendant, and any person claiming under Annada Prasad, it was perfectly good. If the defendant had redeemed Nabakrishna, and the plaintiff had afterwards sought to redeem the defendant, he could only have done so, on the terms of confirming the patni lease, which was prior in date to his own charge. I know of no principle in the law of mortgages, as it exists in this country, which would enable the plaintiff by paying off Nabakrishna to place the defendant in a worse position, which would enable the plaintiff to tack his own charge to that of Nabakrishna, so as to give to himself priority over the defendant to the extent of all the advances made by him directly, or made by others, and got in by him subsequent to the date of the plaintiff's lease.

The plaintiff has not shown that he has kept on foot the mortgage to Nabakrishna as a distinct and distinguishable security, as was done in *Watts v Symes* (1); and if he has not done so, I think that we must treat the case as if the debt to Nabakrishna had been paid off and extinguished, upon a principle similar to that which has been applied in

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(1) 1 De G. Mac & G 249; 3 Ch. 21 L. J. Ch. 713.

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England to cases where the purchaser of an equity of redemption pays off a first mortgage. Generally speaking the rights under the first mortgage are deemed to be extinguished by such payment; thus, in *Toulmin v. Steere* (1), it was held by Sir William Grant, Master of the Rolls, that the purchaser of an equity of redemption who had paid off a prior mortgage out of the purchase-money, and taken a conveyance of the estate from the mortgagee, could not set up that mortgage as against an annuitant who had originally taken subject to it. No injustice is done by applying that rule in the present case. There can be no doubt but the assets in the hands of the plaintiff are abundantly sufficient to satisfy the charge which, if kept alive is alone entitled to priority over the defendants patni.

The result is, that in my opinion the defendant's patni lease of September 1844 is valid and binding on the plaintiff.

The suit must be dismissed with costs in all the Courts.

Judgment for appellant.

[ORIGINAL CIVIL.]

Before Sir Barnes Peacock, Kt. Chief Justice and Mr Justice, Macpherson.

SRIMATI MATANGINI DEBI (PLAINTIFF) v. SRIMATI JAYKALI.
DEBI (DEFENDANT.)

1869
March 10.

Hindu Law—Widow—Unchastity—Act XXI of 1850

A Hindu widow, in whom the property of her husband has once vested, does not forfeit by her unchastity her right to such property (2)

See also 13
B. L. R. 2. *Semble.*—Unchastity followed by degradation or expulsion from caste would not be sufficient to deprive a widow of an estate which she has taken by inheritance.

THIS was an appeal from a decision of Mr Justice Markby. The suit was brought for a declaration of right and for possession

(1) 3 Merivale, 210; but see remarks on this case by Knight Bruce, L J in 3 B. L. R., A. C., 421; and *Saya-Watts v Symes*, 1 De G. Mac & G 240; and *malal Dutt v. Saudamini Dasi*, 5 B. L. R., 362
and Fisher on the Law of Mortgage Vol. II., 787

of the moveable and immoveable property of one Ramgopal Banerjee, deceased. It was alleged by the plaintiff that Ramgopal Banerjee, a wealthy zemindar, died, in March 1861, intestate, and possessed of considerable moveable and immoveable property, leaving him surviving one widow, the defendant, and one daughter, the plaintiff, and two grandsons by a deceased daughter,—Prannath Chatterjee, who died, November 1864, intestate, and without issue, and Maugmohan Chatterjee, who had been, in Ramgopal's life-time, adopted by Ramgopal's brother, Sibkissen Banerjee; that the plaintiff was, in the life-time of her father, Ramgopal Banerjee, married to one Sasibhusan Chatterjee, a Kulin Brahmin, whom she alleged to be still living; that after her marriage, she remained in her father's house, where her husband visited her from time to time, and she was supported and maintained by her father up to the time of his death; that, after his death proceedings were taken by the defendant against one Sibnath Chatterjee, who alleged himself to be the executor of Ramgopal Banerjee, under a Bengali paper writing, dated 21st Bysakh 1266 (May 2nd 1859) purporting to be the will of Ramgopal Banerjee; that, in February 1866, the Court pronounced against the will, and by a decree of July 4th, 1866, it was declared, amongst other things, that the defendant was entitled to the estate of the said Ramgopal Banerjee to be enjoyed by her as a Hindu widow; that pending these proceedings, the Receiver of the Court was appointed Receiver of the estate of Ramgopal Banerjee, and was in possession of the property, both moveable and immoveable; and that after her husband's death the defendant became unchaste, and on 11th November 1867 gave birth to a female child. The plaintiff submitted that, by reason of such unchastity, the defendant had, according to Hindu law, lost and forfeited all right of inheritance to the estate of Ramgopal Banerjee, and that she, as the only surviving daughter of Ramgopal Banerjee, was entitled to inherit all the estates so forfeited by the defendant. And she prayed that it might be declared that the defendant had by reason of her unchastity forfeited her right as widow of the deceased to inherit his property, and that the plaintiff might be declared entitled to inherit the estate; that the defendant might be restrained from receiving the estate of Ramgopal Banerjee

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from the Receiver, or in any way interfering with it; that the Receiver be directed to deliver over to the plaintiff the property of the deceased, and to pass his accounts of the estate; and that he thereupon be discharged and relieved.

The defendant denied the allegation of her unchastity, and stated that the plaintiff was not at the time of the death of her father, nor at present, the wife but the childless widow of Sasi-bhusan Chatterjee, who, as the defendant was informed, and believed, left his country twenty years ago, and died before Ramgopal Banerjee. The defendant submitted that the plaintiff being a childless widowed daughter of Ramgopal Banerjee at the time of his death was not, according to Hindu law, entitled to succeed to his estate, either in the life-time of the defendant by reason of any alleged forfeiture by her, or after her death, and that she had no right to institute the present suit.

MARKBY, J.—Ramgopal, the person to whose property this suit related, had four wives. Three are dead, one is alive, and is the defendant in this suit. She was the person entitled at his death to take his estate for the interest of a Hindu widow, and that interest she still holds, unless she has forfeited it under the circumstances which I am about to state. Two of the other widows died without issue; the other had issue, two daughters, one of whom is the plaintiff in this suit. The other daughter is dead, having left two children, one a boy, and the other a girl; the boy has been adopted into another branch of the family, so that Ramgopal's family is now represented by females alone; his widow, the defendant; his daughter, the plaintiff; and his granddaughter, who is not a party to the suit.

The plaintiff was married to a Kulin Brahmin, who has not lived continuously with her, nor has she ever left the house of her father. She does not seem now to know exactly where her husband is; but I have no reason to suppose him to be dead. Ramgopal was the son of Radhamadhab, who had several sons, and I gather from the evidence that all, or at least several of the members of Radhamadhab's family, are living in the same house, which was the family-house of Radhamadhab. There was no evidence to show whether or no there was ever any

separation in estate, food, or worship, either between the members of the family of Radhamadhab, or between the members of the family of Ramgopal, nor in my opinion is this material.

It was proved that, after the death of Ramgopal, a few weeks before the filing of the plaint in this suit, the defendant had a child by a person in her employ; no other act of unchastity was proved against her, and she has all along resided, and still resides, in the house of Radhamadhab.

The prayer of the plaint is that it may be declared that the defendant has forfeited her right, as the widow of Ramgopal, to inherit his estate by reason of her unchastity; that it may be declared also that the plaintiff is entitled to the estate; that the defendant may be restrained from interfering therewith; and that the Receiver appointed by this Court, who is now in possession of that estate, may be directed to hand it over to the plaintiff.

The question is, whether the defendant's right, as widow to the estate of her deceased husband, has ceased by reason of the act of unchastity. If it has, there is no doubt the plaintiff is entitled as next taker, so that the question is reduced to this:—Does the simple act of unchastity in a widow cause her immediately to forfeit her estate? If it does, the plaintiff is entitled to the declaration which she asks for; if it does not, if it is necessary in order to establish the forfeiture to prove anything more than a simple act of unchastity, then the plaintiff must fail, for here nothing but the simple act of unchastity has been established.

I wish entirely to adopt the duty of a European Judge (though I do not suppose it is confined to European Judges), as laid down by the Privy Council in the case of *The Collector of Madura v. Mutu Ramalinga Sathupathy* (1), where they say that that duty "is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage." But I refer to the older texts, which I am about to quote, not so much to gather from them what is

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the present law, as to trace (however imperfectly) its origin and foundation. And as my object is to see what the older writers have said on this subject, I quote indifferently from the authorities of all the schools.

Of the three collections of laws to which Menu's name is attached, the Brihan Menu, Vrihat Menu, and the Laghu Menu Sanhita, we have an English collection and translation of the latter only. The author of this work, whoever he may be, did not at that time at anyrate consider that widows had any right of succession whatever to the estate of their husbands; for, as he himself wrote (Chapter IX, verse 185), "not brothers, nor parents, but "sons are heirs to the deceased; but of him who leaves no son, "the father shall take the inheritance." The words "nor a wife "nor a daughter," which are inserted after "son," and printed by Sir William Jones in italics, are a gloss of the commentator Colluca (see Preface, page xviii, Ed. 1825, page xv, Ed. 1794, Sir William Jones' translation), as are the similar words interpolated in Chapter IX, verse 217 of the same work. So far therefore as this Menu, or edition of Menu (whichever it ought to be called) is concerned, we cannot hope to find any rule of law applicable to the present inquiry; and as we should expect, he here holds out to a faithful wife, as a reward for her fidelity, the satisfaction arising from a good reputation, and the prospect of rejoining her husband in another world; whereas, if she be disloyal, she is to incur disgrace here, and misery hereafter; but there is no allusion to the loss or gain of any temporary advantage (Chapter IX, verses 29, 30.)

Very early writers, however, appear to have recognized the widow's right of succession. Vrihaspati, as quoted in the Dayabhaga, Chapter XI, Section 1, clause 2, says "in scripture and in the code of law, as well as in popular practice, "a wife is declared by the wise to be half the body of her, "husband, equally sharing the fruit of pure and impure acts. "Of him whose wife is not deceased, half the body survives. "How should then another take his property while half "his person is alive? Let the wife of a deceased man who left "no male issue take his share, notwithstanding kinsmen, a father "a mother, or uterine brother be present. Dying before her

"husband, a virtuous wife partakes of his consecrated fire ; or if
 "her husband die (before her) she shares his wealth ; this is a
 "primeval law. Having taken his moveable and immoveable
 "property, the precious and the base metals, the grains, the liquids,
 "and the clothes, let her duly offer his monthly, half yearly, and
 "other funeral repasts. With presents offered to his manes,
 "and by pious liberality, let her honor the paternal uncle of her
 "husband, his spiritual parents, and daughter's sons, the children
 "of his sisters, his maternal uncles, and also ancient and un-
 "protected persons, guests, and females (of the family). Those
 "near or distinct kinsmen who became her adversaries, or who
 "injure the woman's property, let the king chastise by inflicting
 "on them the punishment of robbery."

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These seven texts, as they are called, seem to be the fullest exposition, and are adopted by Jimutavahana in his treatise as the basis of the widow's right of succession. It will be observed that they contain no special reference whatever to the virtue of chastity, but only to virtue in general. The passage is however differently translated or quoted in Colebrooke's Digest, Book V, verse 399, where the primeval law runs thus :—"Since she was previously espoused in due form, she must support the consecrated fire ; and after the death of her husband, the widow faithful to her lord shall take his wealth ; this is a primeval law." The words which in the one are translated "a virtuous wife," and in the other "faithful to her lord," are "*pativrata*" and "*sadhvi*" (see Shamachurn's Vyavastha Darpana, page 28), and what that is, is fully explained in Colebrooke's Digest, Volume III, page 462, and in the Dayabhaga in the passages cited below. It includes chastity and many other virtues, besides the observance of certain religious practices and austerities. The other (so-called) inspired writers who are quoted in Jimutavahana in favor of the widow's right of succession, are Yajnyavalkya, Vishnu, Katyayana, and Vrihat Menu ; the two last are the only ones who make special mention of conjugal fidelity. The first says (Dayabhaga, Chapter XI, Section 1, clause 56) : "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." The second says (Dayabhaga,

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Chapter XI, Section 1, clause 7): "The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."

Jimutavahana, after noticing certain authorities adverse to the widow's right, then goes on to show that her right of succession is in accordance with the true principles of Hindu law. He "maintains the well-known proposition "that the right of succession is grounded solely on the benefits conferred" (Dayabhaga, Chapter XI, Section 1, clause 33), that is, conferred upon the person whose property devolves; and consequently (section 43) the widow, "because she performs acts spiritually beneficial to her husband from the date of her widowhood [and not as sons, do from the date of their birth] succeeds to the estate in their default;" and then he immediately goes on to describe what the widow's duties are, quoting from Vyasa:—"After the death of her husband, let a virtuous woman observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the names of her husband. Let her, day by day, perform with devotion the worship of the gods, and specially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, though abiding in another world, and herself to a region of bliss." And then he sums up thus (clause 44):—"Since by these and other passages, it is declared that the wife rescues her husband from hell; and since a woman doing improper acts through indigence, causes her husband to fall (to a region of horror,) for they share the fruits of virtue and of vice, therefore the wealth devolving on her is for the benefit of the former owner, and the wife's succession is consequently proper." Then in clause 59:—"Therefore those persons who are exhibited, in a passage above cited (clause 4), as the next heirs on failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of

“it, upon the demise of the widow in whom the succession had vested. At such time (here Srikrishna inserts, ‘when the widow dies,’ and Chudamani inserts, ‘or when her right ceases’), the succession of daughters and the rest is proper.”

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The author of the Mitakshara who discusses the widow's right of succession, in default of sons, at very great length (Chapter II, Section 1), and, as is well known, only partially admits it, starts the discussion with the passage of Yajnavalkya, which is quoted by Jimutavahana. He also quotes (clause 6) under the names of Vriddha Menu and Vrihat Vishnu the same passage which Jimutavahana quotes under the names Vrihat Menu and Vishnu; but the passage of Katyayana quoted by Jimutavahana, is in the Mitakshara quoted or translated somewhat differently (clause 6 :—“ Let the widow succeed to her husband's wealth, provided she be chaste; and in default of her, the daughter inherits if unmarried;” and he quotes also this passage from the same writer :—“ The widow being a woman of honest family, or the daughters; or on failure of them, the father, or the mother, or the brother, or his sons, are pronounced to be the heirs of one who leaves no male issue.” From Vrihaspati he quotes one only of the seven texts quoted by Jimutavahana :—“ Let the wife of a deceased man who left no male issue take his share, notwithstanding kinsman, a father, a mother, or uterine brethren be present.” Amongst writers who have held opinions adverse to the widow's succession, the author of the Mitakshara quotes Nareda, Menu; Sancha, and Katyayana in another passage (Chapter II, Section I, clause 7.) The result he sums up in these words (clause 39) :—“ Therefore it is a settled rule that a wedded wife, *being chaste*, takes the whole estate of a man who being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue.”

It is remarkable that, in discussing and opposing the opinion of Dhareswara (Chapter II, Section 1, clause 8), who, relying on a passage in Gautama, maintained the doctrine that a widow succeeded to the property of her husband, only in case she were solicitous of permission to raise up offspring to him, the author of the Mitakshara treats the references to chastity in the passages above quoted as bearing upon this disputed point.

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Thus (clause 18) he says:—" Besides, it is fit that a chaste woman should succeed to the estate, rather than one appointed to raise up issue, reprobated as this practice is in the law, as well as in popular opinion. The succession of a chaste widow is expressly declared ;" and then he quotes the passage of Vriddha Menu, or Vrihat Menu, already mentioned, and the conclusion he comes to is that the widow " may either seek to obtain progeny, or may remain chaste." This, the Biswambhara Bhatta as quoted by Mr. Colebrooke, changes into " either she must seek male issue by means of an appointment for that purpose, or she must remain chaste."

In the Vivada Chintamani (Baboo Prasanna Kumar Tagore's translation, page 289), Vrihat Menu is quoted, but either the translation or the original differs from that of the Dayabhaga, In the Vivada Chintamani, the passage runs thus :—" A widow who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duties of widowhood, shall alone offer the cake at his obsequies, and succeed to his whole estate." The author of the work then quotes from Vrihaspati the greater portion of the seven texts above mentioned, and the important passage runs thus :—" If the wife die before her husband, she shall receive his consecrated fire ; if not, the widow faithful to her lord, shall take his wealth ; this is a primeval law : " and " faithful to her lord " is declared to mean chaste.

The passage on this subject in the Vyavahara Mayukha, at least as translated, is very confused ; the author quotes, under the name of Prajapati, the primeval law of Vrihaspati in the same terms as Jimutavahana ; and he quotes several passages from Katyayana, which I can hardly identify with those already mentioned. His own conclusion, Chapter IV, Section 8, verse 2, Stokes' edition, page 84, is that a " wife faithful to her husband takes his wealth, not if she be unfaithful."

The Dayakrama Sangraha throws no additional light on this subject. A passage from Katyayana is quoted there (Chapter I, Section 2, verse 1, Stokes' edition, 474) in the same terms as in the Dayabhaga, Chapter XI, Section 1, clause 56.

Colebrooke's Digest (Volume III, page 462) quotes the seven texts from Vrihaspati in the terms I have already stated, and says

that "Udayacara 'explains faithful to her lord' in this passage, "to mean 'firm in the rigid duties of a faithful widow.'" He then goes on to give the definition of such a woman, quoting from Harita, but the author to whom he probably refers is Vrihaspati (See Book IV, verse 107 of his own work), who says, "The virtuous woman who is indisposed when her husband is sick, "pleased when he is cheerful, squalid and pining when he is "absent, dies when he deceases, must be considered as truly "faithful to her lord." In another part of Colebrooke's Digest (Book IV, Section 2, page 459) are collected a variety of passages describing the duties of widows who choose to survive their husbands. What is chiefly enjoined is the general practice of austerities. Eating the leaf of the betel, feeding from vessels of zine, eating more than one meal a day, sleeping on a bed, using perfumed substances, and sexual pleasures generally, are all forbidden. No special mention is made of chastity; "but a widow who, from a wish to bear children, slights "her deceased husband by marrying again, brings disgrace on "herself here below, and shall be excluded from the seat of her "lord." This is quoted from Menu in Chapter V, verse 161. Baboo Shama Churn, in the Vyavastha Darpana, page 28, quotes the following passage from Katyayana: "The wife who does "malicious acts injurious to her husband, who has no sense of "shame, who destroys his effects, or who is addicted to adultery, "does not deserve property." I do not find this passage anywhere quoted by the authors I have above referred to except in the Vivada Chintamani (page 265), where the last few words run thus: "is held unworthy of the property before described." This seems to be her own separate property, and an allotment for maintenance. No reference is made to the passage where the author comes to discuss the succession of widows.

All the commentaries quoted above contain chapters on exclusion from inheritance. It seems to me, however, not a little remarkable that I do not find that in any of them mention is made of "unchastity" as a ground of exclusion. "Impotent persons, outcasts, persons born blind or deaf, madmen, idiots, the "dumb, such as have lost the use of a limb;" is the list given by Menu of persons who are excluded, and I do not find it has

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been much extended. Nareda adds,—“One who is addicted to
“vice or has been expelled from society;” Devala adds,—“A leper
“and a person wearing the token of religious mendicency;” persons
of neutral sex, and the offspring of incestuous intercourse
have also been added. Sancha and Lichita are quoted by Jagannatha
(Volume III. page 300) as saying “of him who has been
“formally degraded, the right of inheritance, the funeral cake,
“and the libation of water are extinct.” The author of the
Vyavastha Darpana is the first Hindu Commentator that I
have seen who brings in the unchastity of the widow as a separate
cause of exclusion from inheritance. It will be seen, however,
presently, that he does not thereby introduce any new doctrine
as to exclusion, because he only excludes when she would fall
under one of the classes above mentioned, namely that of an
outcast.

In Sir William Macnaghten's collection of cases, a case is
mentioned (Case iii, Volume II, page 19), in which the Pundits
were asked what would be the effect of the unchastity of the
widow after the death of the husband? They answered :
“It is the general doctrine that the virtuous widow of a
“man, who dies leaving no heir down to the great-grandson,
“succeeds ; but that if she, on the death of her lord, be faith-
“less to his bed, she has no right of succession.” For this they
cite Vrihaspati, Katyayana, Vrihat Menu, and Nareda. What
the three first say I have already shown.

The passage said to come from Nareda is that already referred
to, as quoted by Baboo Shama Churn in the Vyavastha Darpana,
28, and the author of the Vivada Chintamani, 265; from
Katyayana, and which is omitted in the other Commentaries.

In the next case (page 21) the question is asked, whether a
widow, who had become a prostitute, was entitled to succeed, and
the Pundits answered that, “If it be proved that the widow, in
fact, did not “keep her husband's bed unsullied, she has no title
“to his property, and ought to be expelled from his house.” The
opinion of Sir Thomas Strange is given at Volume 1, page 136 of
his work, and it is that “an unchaste wife is excluded from the
“inheritance, but nothing short of actual infidelity in this respect
“disqualifies, nor the inheritance once vested in her, is it liable to

"be divested, unless for loss of caste unexpiated by penance
 "and unredeemed by atonement." It appears that this, how-
 ever, is really an opinion of Colebrooke's adopted by Sir Thomas
 Strange, the original opinion of Colebrooke's being given in very
 nearly the same words at page 272 of Volume 11 of Strange's
 work and from the opinions of the Pundits there quoted, it would
 seem that the occasion of the opinion was a difficulty which had
 arisen in Madras as to how the incontinence of the widow ought
 to be established. We have here, therefore, a direct expression
 of opinion by the highest European authority on Hindu law, sup-
 ported by another European authority of considerable eminence.

At page 159, Strange quotes from Colebrooke a passage in
 which the causes of exclusion from inheritance are discussed.

Although there is no mention of unchastity in it, it is, I think,
 important to refer to it, because, taken with the opinion of Cole-
 brooke already referred to, it shows completely what his views
 were on the subject. He says: "In regard to the causes of dis-
 inheritance discussed in the Digest, Book V, Chapter V, Sec-
 tion 1, corresponding with 5th Chapter of Jimutavhana and
 the 10th Section, Chapter 11 of the Mitakshara, I am not
 aware that any can be said to have abrogated, or to be
 obsolete. At the same time I do not think any of our Courts
 would go into proof of one of the brethren being addicted to
 vice, or profusion, or of being guilty of neglect of obsequies
 and duty toward ancestors. But expulsion from caste, leprosy,
 and similar diseases, natural deformity from birth, neutral sex,
 unlawful birth resulting from an uncanonical marriage, would
 doubtlessly now exclude; and I apprehend it would be so
 adjudged in our Adawlut." Strange dilates at length upon
 this passage, and points out that the power of degradation or
 expulsion from caste can be exercised, and its consequence; and he
 again (at page 163) puts the forfeiture of the widow for unchastity
 on the ground taken by Colebrooke, namely, loss of caste.

The decided cases in which this question has arisen are extreme-
 ly few. In Morton's decisions, there is a case of *Doe d Radha-*
money Raur v. Neelmoney Doss (1), where it was proved that the

(1) Montrion's H. L. Cases. 314.

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widow, who was claiming her husband's share, had, after her husband's death, been incontinent, and had long since quitted the house and protection of her husband's family; it is said to have been held by Chambers, C. J., Hyde, Jones, and Dunkins, J J., that she had by her incontinence forfeited her right to her husband's estate. In the case of *Maharanees Bussunt Koomarees v. Maharanees Kummul Koomarees* (1), what is held by the Court below was that a widow who voluntarily quitted the family house by night in the same carriage with a Baboo, was not entitled to have a separate house and maintenance provided for her, but the Judge awarded her rupees 1,000 *per mensem* conditionally upon her return. The Court of Appeal, however, considered that she had "by her conduct forfeited all legal claim according to the Shastras to maintenance from her husband's family;" there is not a word about chastity or unchastity in the report, though perhaps an elopement may be hinted at. But they seem to have considered the widow's right to consist in a claim to food, apparel, and a residence only, and not to any sum of money in lieu thereof; and I gather that they deprived her of maintenance on the mere ground of her having absented herself from the family house, a decision which could hardly now be supported. The report is very meagre, but I cannot help thinking that if it had been considered necessary to come to a distinct finding upon the question of chastity, either this finding or the facts leading to it would have been explicitly stated.

In the case of *Raj Koonwarees Dassee v. Golabee Dassee* (2), the elder widow brought a suit to recover the deceased husband's property against the younger widow. The younger widow repudiated the plaintiff's claim, on the ground that the plaintiff had, during her husband's life-time, eloped with another man, against whom her husband had brought an action for the seduction, and recovered damages; and that her husband had never afterwards admitted the plaintiff into his house or cohabited with her. The Court in their judgement, first discuss the evidence of incontinence which they consider conclusive. They do not how-

(1) 7 Sel. Rep. 144.

(2) S. D. A. (1858),—1891.

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ever rest the case there ; they proceed to consider a contention on behalf of the plaintiff that there was no express declaration or solemn act on the part of the husband from which the Court could infer that it was his intention to disinherit her, and they proceed to find that it was his deliberate and fixed intention that she should not after his death participate beneficially in his estate. It is clear, therefore, that this case is rather an authority to show that even adultery in the husband's life-time is not in itself sufficient to dis-entitle the wife to inherit, but that the husband may for this cause by a clear expression of intention deprive her of her right to succeed him.

This is all that, with the very able assistance of the learned counsel who argued this case, I have found in the way of authority or comment upon the question now before me. Leaving aside those passages in the Hindu law books which speak of the duties of a wife, I think it is clear that the observance of chastity is strongly enjoined on the widow ; and looking to the reasoning by which Jimutavahana established her claim to the succession, namely, by the performance of acts beneficial to her husband, there is no doubt some ground for the argument that she continues to hold the estate only so long as she performs the duties which are the foundation of her right. But such a principle has never been enunciated, nor do I find the least trace of its being acted upon in Hindu law, if it did exist. If the widow, who ceased to perform acts beneficial to her husband, lost her estate, she would lose it for other causes besides unchastity. The argument would be just as strong in favour of forfeiture in case of her failure in any of the other numerous qualifications of a *pativrata sadhvi*, as in the case of unchastity. And it would apply not only to widows, but to sons whose right to inherit is put upon the same ground, and upon whom virtuous conduct is hardly less strictly enjoined.

On the other hand, I think, that this argument, by way of inference, may be met by one not less strong on the other side. I think if loss of chastity had *ipso facto* been a ground of exclusion from inheritance, it would have certainly been mentioned as such by some one of the commentators in the chapter on that subject, or at least if not there mentioned, that in some one of

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the above quoted passages where chastity is enjoined, the punishment of it by forfeiture would have been declared.

The conclusion which I come to, and which is based upon the opinion of Colebrooke cited by Strange already referred to, is, that neither for unchastity, nor any other vicious act, is a right forfeited under the Hindu law. There are acts of gross and continued immorality for which a Hindu may be completely and irrevocably cut off from his family, and from that moment he is to all intents and purposes as one dead, so far as the family is concerned, to which he formerly belonged; ceremonies are performed as if he were actually so (1 Strange 160,) and the fiction of Hindu law is that from that moment he dates a new existence, as will be clearly seen by the rules which regulate the rights to property which he afterwards acquires. Of course, therefore, the property held by such a person passes on to the next taker. How far this power of degradation would now be recognized by the law, and whether unchastity in a widow would be a just cause of degradation, are questions which it is in no way necessary for me now to consider. One of them at least is a question of no little difficulty. What I now hold is, that it is not the immoral act alone which in any case destroys the right, but the loss of caste, or degradation which may follow thereupon. This explains the silence of the Hindu law books as to forfeiture for particular acts of immorality, and accords entirely with the doctrine of expiation, which would otherwise appear to be almost unmeaning.

This view of law is supported, as I have said, by the authority of Colebrooke and Strange; it is not opposed, as far as I am aware, by any European writer on Hindu law; and I think it by no means unimportant to observe that it is also that which is adopted by an able living writer on the Hindu law of the Bengal school, who must be well acquainted with the opinions current on this subject amongst the most learned of his countrymen. Baboo Shama Churn Sircar, in his work already referred to at page 1016, thus sums up the law on this subject. "It should however be observed that the woman who is adulterous at the time when succession opened, or who previously committed adultery which remained unexpiated by penance,

"forfeits her right to inheritance and maintenance ; and, " not she who was previously adulterous but ceased to be so " and cohabited with her husband, or expiated, or was about to " expiate the sin by penance before the time of succession ; and " not also she who became adulterous after inheriting property " or obtaining maintenance, unless the crime were such as to " cause complete degradation by loss of caste unredeemable by " atonement." Of the three decided cases, the first is, I think, too scantily stated for any very secure inference ; it is certainly not sufficient to outweigh the combined authority of Colebrooke and Strange. The second did not, I think, turn at all upon the question of chastity. The third relates not to forfeiture by a widow, but to the right of a husband to exclude his unchaste wife from her rights as such. It is, in my opinion, a perfectly correct decision, and supports the law as laid down by Baboo Shama Churn Sircar on this subject, in the passage I have just referred to ; but it rests on a totally different principle from forfeiture. It might rather be termed the exercise of a summary power of divorce by the husband for adultery. It in no way conflicts, on the contrary, I think it accords in principle, with the view I take of the law, because even there it would appear that the simple act of unchastity did not cause disinheritance, but only such an act followed by an express exclusion.

The result is that, I hold that the defendant has not, by the simple act of unchastity proved against her, she not having been degraded or expelled from caste, forfeited her right as widow of Ramgopal to inherit his estate. The suit, therefore, fails altogether and must be dismissed with costs on scale 2.

From this decision the plaintiff appealed on the following grounds :

1. That unchastity in a Hindu widow works a forfeiture of, or terminates, her estate and interest in her husband's property.

2. That incontinence in a Hindu widow in itself involves loss of caste, and is an offence for which Hindu law has not provided any atonement or expiation ; and that even if expiable or redeemable, there was no evidence that the defendant had ever effected redemption by expiation, or was about to do so.

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3. That the incontinence of the defendant was followed up by her leaving her husband's house, to which, so far as can be gathered from the evidence, she had no intention, at least for some time, of returning.

4. That chastity is an essential condition to the continuance and enjoyment by a Hindu widow of the estate of her deceased husband, for whose benefit alone she takes the estate; and that wholly apart from any outcasting or degradation, incontinence causes the estate to revert to the next heir of the deceased proprietor capable of conferring benefits on him as his representative.

5. That the suit should not have been dismissed with costs.

Mr. Woodroffe and Mr. Marindin for the appellant.

The Advocate-General Mr. Graham and Mr. Evans for the respondent.

Mr. Woodroffe.—By unchastity a Hindu widow forfeits all rights she would otherwise have had in the property of her husband, Colebrooke's Digest, Book IV, Chapter I, verse 8; this text also speaks of unchastity after the death of the husband. A Hindu widow takes his estate for the benefit of her husband, and her adoption of a son works benefit by substitution; but if she does not benefit her husband, she should not take, the consideration on which she takes is gone—Dayabhaga, Chapter XI, Section 1, verses 43, 44, 45; *Id.*, verses 30, 32. The Court below seems to have thought that the text of Vrihat Menu, Shama Churn's Vyavastha Darpana, 24, refers to the conduct of the wife in her husband's life-time, but "persevering in religious observances" cannot apply to the wife in the life-time of her husband—Dayabhaga Chapter XI, Section 1 verse 43. In Colebrooke's Digest, Book IV, Chapter II, verse 105, it is said "fruitless are the sacrifices of immoral women;" by immorality they take themselves out of the category of persons who can inherit. See Colebrooke's Digest, Book V, Chapter VIII, verse 409. How can the widow have a right before perform-

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ance of acts for husband's benefit? If after performance she has acquired rights, she forfeits them by unchastity—Shama Churn's Vyavastha Darpana, 25. As to when her right ceases, see Dayabhaga, Chapter XI, Section 1, verse 59; Shama Churn's Vyavastha Darpana, 9. If it is objected that the first of these texts is a gloss by Chudamani, a later author, that shows that the doctrine with regard to the right ceasing did not become obsolete. See also Dayabhaga, Chapter XI, Section 1, verses 7 and 56. Mitakshara, Chapter II, Section, 1, verses 6 and 11. Dyakrama Sangraha, Stoke's edition, Chapter 1, Section 2, verses 3, 4, and 5. As to maintenance, women who are perverse should be maintained—Dayabhaga, Chapter V, verse 19; 1 Strange's Hindu Law, Chapter VI, 134. As to the divesting of the right, Chapter VII, 163, maintenance is forfeited by the widow's unchastity—Chapter VIII, 172; 2 Strange's Hindu Law, 269, 272, 273. See opinion of a Pundit in Hooghly, who refers to various texts in support of it—2 Macnaghten's Hindu Law, 18, 21. This shows that whatever time the unchastity occurs, it is effective in working forfeiture. See Elberling, 75, on a widow's estate, where she is said to hold on two conditions that she is chaste, and that she commits no waste. In *Doe d Radhamoney Raur v. Neelmoney Doss* (1), it was held that the widow had forfeited the right to her husband's estate—In *Doe d Saummoney Dossee v. Nemy Churn Doss* (2), the case of *Doe d Radhamoney Raur v. Neelmon ey Doss* (1) is not cited. Act XXI of 1850 does not apply—see the Preamble. *Raj Koomwaree Dassee v. Golabee Dassee* (3) is a case where the incontinence was during the life of one husband; that case was not argued—see per Sconce, J., who appears to hold that unchastity is a cause of loss of caste when known. If excommunication takes place for a matter inconsistent with religion, it may be that Act XXI of 1850 would apply. In *Maharanees Bussunt Koomaree v. Maharanees Kummul Koomaree* (4) a claim for maintenance was dismissed, and there is no distinction drawn between the consequences of unchastity as regards maintenance and inheritance,—see also Shama Churn's

(1) Montrion's H. L. Cases, 314

(3) 14 S. D. A. (1858), 1891.

(2) 2 Taylor & Bell, 300.

(4) 7 Sel. Rep., 144

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Vyavastha Darpana, on Exclusion from Inheritance, 1015, verse 662. Fallen persons, as well as outcasts, are excluded—*Id.*, 997, verse 657. There is no expiation for the crime of unchastity in women—see Menu, Chapter XI, verses 55, 59. All the references seem to have reference to the misconduct of the man with a woman. In text 72 and the following ones it is shown how crime may be expiated; in every case it is spoken of as to be performed by a man; nowhere is expiation for women spoken of. In the present case, there is no inclination for expiation, even if any were possible. At the time of the Hindu marriage Act XV of 1856, as stated in the preamble, a second marriage was looked upon as legalized fornication. It cannot be that the position of a woman marrying a second time is worse than that of one who is unchaste. The position of the former is correctly described in section 2 of Act XV of 1856.

Mr. *Marindin* on the same side.—Where a person is excluded from inheritance for disease, he has still a right to maintenance; but all the authorities are agreed that where a woman is excluded from inheritance, she has no claim to maintenance. There is a difference of opinion as to whether a man who loses his right of inheritance as an outcast loses his right to maintenance also.—Shama Churn's Vyavastha Darpana, 371, 372, verses 201, 203. The deprivation of loss of maintenance thus does not follow always loss of caste; it may arise from something else. An unchaste widow loses right to maintenance—2 Macnaghten's Hindu Law, case ii, 109 case v, 112; *The Collector of Masulipatam v. Cavalry Vencata Narrainappah* (1). The tenure of a Hindu widow is one qualified by texts of Hindu law, which say that she should remain chaste. In this view of the case, Act XXI of 1850 would have no effect; it might apply if losing caste was the cause of her deprivation of property; but there are two consequences of unchastity,—first an unchaste widow breaks the condition in which she holds the property, second she loses caste. It is clear that at the time of the passing of Act XV of 1856

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it was considered that remarriage was followed by penal consequences. [PEACOCK, C. J.—That is an opinion of the Legislature which may have been wrong.] It is not conclusive, but is authority to guide the Court. [PEACOCK, C. J.—It was the ceremony of marriage, not the consummation, which was thought by the Legislature was the cause of forfeiture.] There is no text to that effect; the ceremony of marriage might have been tantamount to an act of chastity. [PEACOCK, C. J.—The Legislature say it was thought that second marriage was invalid.] The Legislature thought that by a second marriage the proprietorship of the widow in the husband's property was lost—see section 2 of Act XV of 1856. There is no text of Hindu law which says the widow forfeits the property on remarriage, therefore the only ground on which the forfeiture would arise is that the remarriage is in itself an act of unchastity. In Srikrishna's Commentary there is a note: "hence the right of an adulterous woman ceases"—Shāma Churn's Vyavastha Darpana, 28; and in the index to that work, the same word *patni* is applied to both wife and widow, so that adultery would be applied unchastity both before and after the husband's death. [PEACOCK, C. J.—There is this difference that a husband can condone adultery committed during his life, or it may be expiated.] It is contended there is no expiation. [PEACOCK C. J.—Menu, Chapter XI, Section 177, shows how a woman can expiate; if a wife can expiate and a widow cannot, they are not in a like position. Is there any text in Hindu law that a widow's estate ceases by reason of her adultery?] Colebrooke's Digest, Book V, Chapter VII, verse 409, note by Jagannatha, and note by Naredato verse 405. [PEACOCK, C. J., refers to 2 Strange's Hindu law, 272. Does the forfeiture take place immediately or is time to be given to expiate? Mr. Woodroffe.—It means that unchastity operates as an immediate disherison. PEACOCK, C. J.—Disherison means preventing her from inheriting. It must be read in connection with the case there reported. That seems to lay down that unchastity destroys both the right to inherit and to keep the property already inherited,—see The Mitakshara, Chapter II, Section 1, verses 30 and 37.

The Advocate-General, for the respondent.—By the Hindu law

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as administered in Bengal there is no defeasible estate. An estate once vested cannot be divested. The ground of the widow's right is her power of conferring benefit on the husband. Sons succeed first, because they can confer most benefit, but they do not succeed conditionally on their conferring benefit, nor do any other heirs succeed conditionally; why then is it said that the widow succeeds conditionally. Suppose she spends the whole income on herself instead of applying it for her husband's benefit; there is nothing to show she would thereby forfeit the estate. If she attempt to alienate the *corpus* she may be restrained by injunction, but she does not forfeit the estate. No distinction can be drawn between those texts which lay down the law and those which are meant to be merely procepts. There appears to be a difference between the Mitakshara and Bengal schools as to vesting and divesting of estates. But all the texts and cases refer to the *punctum temporis* of the death of the owner, they all refer to the right to succeed. *Mussamat Bhoobun Moyee Debia v. Ramkishore Achari Chowdhry* (1); *Pareshmoni Dasi v. Dinanath Dos* (2). The case of *Doe d Padhamoney Raur v. Neelmoney Doss* (3) is very meagrely reported, and was decided at a time when a Hindu widow's estate was not well understood; so with the case of the *Maharanee Bussunt Koomarre v. Maharanee Kummul Koomaree* (4). In the case of *Raj Koonwaree Dossee v. Golabee Dassee* (5), the adultery was committed in the life-time of the husband; there was a renunciation of the woman by the husband. From the case of *Doe d Radhamoney Raur v. Neelmoney Doss* (3) to the present time, there has been no instance of a forfeiture of property once vested. It is clear from the preamble to Act XV of 1856, that there had been a great many instances of unchastity among Hindu widows, yet there was no case of forfeiture. Had there been a forfeiture, there would have been less unchastity.

Mr. Graham on the same side.—There is no authority for saying that unchastity will produce forfeiture. It has not been decided; 1 Strange's Hindu Law, 163; 2 Macnaghten's Hindu Law, 19. One of the questions there was as

(1) 10 Moore's I. A., 379.

(2) 1 B. L. R., A. C., 117.

(3) Montriou's H. L. Cases, 314.

(4) 7 Sel Rep., 144.

(5) 14 S. D. A. (1858), 1891.

to the conduct of a woman who was unchaste after her husband's death. The passage cited from Elberling, 73, is no authority. In *Doe d Radhamoney Raur v. Neelmoney Doss* (1), a widow who was incontinent was held to have forfeited her estate, but in the later case of *Doe d Saummoney Dossee v. Nemy Churn Doss* (2), the contrary was held. The case of *Doe d Radhamoney Raur v. Neelmoney Doss* (1) is not of much authority, and the report is meagre. In Shama Churn Sircar's *Vyavastha Darpana*, 25, verse 37 of Chapter II, section 1 of the *Mitakshara* is translated. "A woman, young and widowed, is intractable, but separate property must always be given to women that they pass their destined life,"—that also intends a woman who is only suspected of unchastity, showing that the right to maintenance was not forfeited. *Colebrooke's Digest*, Book IV. verse 78, says: "Wives of Brahmins approached by a man of the servile class are purified, provided they bring forth no children by such commerce, and this shows that expiation might be performed. The case of *Doe d Saummoney Dossee v. Nemy Churn Doss* (2) shows the reluctance of the Courts to disturb possession, and there is nothing to show that the case of *Doe d Radhamoney Raur v. Neelmoney Doss* (1) was not before the Court in the later case. In *Raj Koonwaree Dossee v. Golabee Dassee* (3) the incontinence occurred in the life-time of the husband; and she was held to have forfeited her right to succeed to the property, which had not then vested in her.

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Mr. Woodroffe in reply.—The argument of the Advocate-General as to the impossibility of divesting an estate once vested by the Bengal school is not applicable to the present case. It might well be too that the coming into existence of another heir would not divest the estate from a person in whom no change had taken place, that is the case in *Mussamat Bhoobun Moyee Debia Ram Kishore Acharj Chowdhry* (4), where too the power to adopt became infructuous. So as in the case of *Karunu Mai v. Jai Chandra Ghos* (5), there being no nearer relation, the sister might

(1) Montrion's H L Cases, 314.

(2) 2 Taylor & Bell, 300.

(3) 14 S D A (1858 1891.)

(4) 10 Moore's I A 279.

(5) 5 Sel. Rep. 42.

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take on the chance of giving birth to a son who would be the nearest heir. In the present case there is a change taking place in the widow after vesting—a change in respect of the condition on which she took the estate. It is said that you cannot draw a distinction between the texts which are law and those which are merely precepts, but I think the distinction appears in them. Srikrishna says, see Shama Churn's Vyavastha Darpana, 28, "The rights of an adulterous woman cease." Narada says, *Id* 29: "Brothers are to resume the allowance of an unchaste widow." In the Smriti Chandrika (an authority in Southern India) edition of 1867, Madras 1850, Vrihaspati says: "The widow preserving the honor of the family,"—i.e. living virtuous, "shall obtain" (1). In these the unchastity is a condition which it is necessary to fulfil; the other parts are preceptive. Chastity is a duty incumbent on widows, and if they fail to perform it, their right ceases. It seems to be admitted that adultery, while the husband is alive (unless condoned or expiated), causes a woman to forfeit her right to inherit. There can be no condonation or expiation in a widow. It is said to be strange that there is no mention of unchastity in treating of exclusion from inheritance, but see Vyavahara Mayukha, Chapter IV. section 11, verse 12. An unchaste woman is to be expelled and not maintained; a perverse one to be expelled, but to be maintained—see *In the goods of Dadoo Mania* (2). A widow enjoys the estate for the benefit of her husband as a kind of joint tenant, but it is laid down that "the religious acts of an unchaste woman are worthless." Mahabharata, Volume IV, verse 754 and 755. There is a distinction between the son and the widow. The son by his birth keeps his father from *put*, the widow does not confer benefits until after widowhood.

PEACOCK C J.] (3).—This case has been very ably argued on both sides. It appears to me that the Judgment of the Court of original jurisdiction ought to be affirmed. There is no doubt that, according to the Hindu law of inheritance, a wife who commits adultery during the life-time of her husband, loses her rights

(1) See also Vyavahara Mayukha Chapter IV, section 8, verse 4.

(2) In Jur., O. S., 60.

(3) This judgment was thus taken down by the officer of the Court; at the time it was delivered, but was not afterwards seen or signed by the Chief Justice.

to inherit her husband's estate, unless the act is condoned by her husband, or expiated by penance. But the question involved in the present case is, whether a widow who succeeds to her husband's estate by inheritance, holds that estate merely so long as she remains chaste, or forfeits the estate which has become vested in her if she is guilty of unchastity.

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There are some authorities both ways. Giving the case my best consideration, it appears to me that the Judge in the Court below arrived at a correct conclusion. He has so fully entered into the authorities and arguments, that I do not purpose to go to much length in the consideration of the question.

Mr. Colebrooke's opinion, as expressed in his remarks upon the Trichinopoly case (1), appears to me to be correct. He says:—
“An unchaste woman is excluded from the inheritance of her husband. But no misconduct, other than incontinency, operates disinherison; nor after the property has vested by inheritance does she forfeit it, unless for loss of caste, unexpiated by penance, and unredeemed by atonement.”

It was said in argument that the right of inheritance or succession according to the Hindu law is founded on benefits to be conferred upon the ancestor. “He who takes the estate of the deceased is to perform his obsequies.” This is not true in every case, for it is laid down that, “if one be heir to an estate, and another be qualified to perform the *shraddah*, he must give sufficient property, and cause the rites to be celebrated by him who is qualified to perform them;” see *Vyavastha Darpana*, page 363, where reference is made to Colebrooke's Digest, Volume III, pages 545, 546. But, however that may be, there is no authority to show that the person who takes an estate by inheritance, holds that estate only so long as he performs those duties which are morally imposed upon him, or that he forfeits the estate which he has taken if he ceases to perform those duties. It is clear that, according to the Bengal school, a man who takes an estate by inheritance may sell or otherwise dispose of it.

As regards male heirs, an estate taken by descent is not forfeited by neglect of those moral duties which are imposed upon

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an heir ; and I see no authority sufficient to induce me to think that the estate taken by a Hindu widow by inheritance is an estate only so long as she continues chaste, or an estate liable to be forfeited by an act of unchastity. If the estate is to continue only so long as she continues chaste, it would cease immediately upon an act of unchastity ; and in that respect a widow would be in a worse position than a wife, inasmuch as a wife may inherit if her offence is expiation before the death of her husband ; but if a widow's estate cease, expiation could not restore it.

So, in the case of persons incapable of inheriting, such as a leper, leprosy at the time when the right of inheritance accrues would destroy the right of inheritance ; but leprosy, after an heir has succeeded, is no ground of forfeiture ; nor is the estate of an heir held only so long as he is free from a sinful disease which would prevent him from inheriting.

In Baboo Shama Churn's Vyavastha Darpana, it is stated that a " woman who is adulterous at the time when succession opened, " or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance ; " and not she who was previously adulterous, but ceased to be so, " and cohabited with her husband, or expiated, or was about to " expiate, the sin by penance before the time of succession ; and " not she also who became adulterous after inheriting property, " is not prevented from holding the estate, " unless the crime were such " as to cause complete degradation by loss of caste unredeemable " by atonement."—Vyavastha, 663 page 1016. Although Baboo Shama Churn Sircar is no authority on Hindu law, it appears to me that he has there given a correct view of the law on the subject.

In the case of *Katama Natchier v. The Rajah of Shiva Gunga* (1), it was held that a decree in a suit brought by a Hindu widow binds the heirs who claim in succession to her ; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shewn that she had committed an act of adultery before she commenced the

suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate, might be avoided by taking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favor of the opposite view are merely the expressions of opinion by Hindu law officers, or by European or modern text writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight.

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The case which was cited from Chambers's notes in Mr. Montrion's edition of Morton's decisions, *Doe d Radhamoney Rau, v. Neelmoney Doss* (1), is given very shortly. In that case it was held that the incontinence of a widow creates a forfeiture of her claim to the succession. That decision is counterbalanced by the case of *Doe d Saummoney Dossee v Nemy Churn Doss* (2) which was later in date, and also decided by the Supreme Court. Sir Lawrence Peel in that case held that a widow did not forfeit her estate by living and immoral an unchaste life. He said: "Further, in this case, the widow had been for some time in rightful possession, and the Court would be disinclined to disturb her, in the absence of any decision of a Court of law, shewing that such a person, for such reason as above stated, might be expelled from possession."

Mr Justice Markby has stated that adultery is not sufficient to deprive a widow of an estate, which she has taken by inheritance from her deceased husband, in the absence of degradation or expulsion from caste. I wish to avoid being supposed to express any opinion that, if she were degraded, or deprived of her caste, her estate would cease to exist.

Conflicting opinions have been expressed as to the construction of Act XXI of 1850. With reference to that Act, Sir Lawrence Peel, in the case to which I have referred of *Doe d Saummoney Dossee v Nemy Churn Doss* (2), observed, "that it

(1) Montrion's H L Cases, 314.

(2) 2 Taylor & Bell 300.

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" was provided by Act XXI of 1850 that so much of any law
 " or usage now in force in India, as inflicted on any person for-
 ' feiture of rights of property, or might be held in any way to im-
 " pair or affect any right of inheritance by reason of his or her
 " being deprived of caste, should cease to be enforced as law."

His opinion therefore, appears to have been, that the Hindu law so long as it inflicted forfeiture of rights of property, or impaired or affected rights of inheritance by reason of deprivation or loss of caste, was intended to be abolished by the Act to which he refers. The late Sudder Court took a different view of that Act in the case of *Raj Koonwaree Dassee v. Golabee Dassee* (1). They read it with the light thrown upon it by the preamble, for, referring to the case which had been decided by Sir Lawrence Peel, they say: " With every respect for that opinion, and without the
 " means of ascertaining whether the particulars of the present
 " case are the same as those upon which it was given, we must
 " determine the point irrespectively, and with reference solely to
 " the intent and meaning of the Act, as they may be fairly and
 " reasonably gathered from the latter portion of it taken in
 " connection with the preamble." Mr Sconce says: " the title
 " of Act XXI of 1850 declares its purpose to be the extension of
 " the principle of section 9 of Regulation VII of 1832, and in the
 " preamble this principle is embodied, being to the effect that if
 " one party to a suit should not be of the Hindu (or Mahomedan)
 " persuasion, the laws of the Hindu religion shall not be suffered
 " to deprive him of any property, to which, but for the operation
 of such laws, he would have been entitled. Accordingly, in the body of the Act it is declared that any law, which may impose
 " a forfeiture of rights, as a consequence of the renunciation of,
 " or exculsion from, the communion of any religion, or of being
 " deprived of caste, shall cease to be enforced as law." He holds that being deprived of caste, reading it in connection with Regulation VII of 1832, meant loss of caste by reason of renunciation of religion or by reason of excommunication from religion.

Looking very carefully at Act XXI of 1850, it appears to me that the preamble is wholly irrelevant to the enacting part

(1) 14 S. D. A. 1858, 1895.

of that Act. The Act is called "an Act for for extending the principle of section 9, Regulation VII of 1832, of the Bengal Code, "throughout the territories subject to the Government of the "East India Company." It recites that it was enacted "by "section 9, Regulation VII of 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of "different persuasions, when one party shall be of Hindu, and "the other of the Mahomedan persuasion, or where one or more of "the parties to the suit shall not be either of the Mahomedan or "Hindu persuasions, the laws of those religions shall not be permitted "to operate to deprive such party or parties of any property to "which, but for the operation of such laws, they would have been "entitled; and whereas it will be beneficial to extend the principle "of that enactment throughout the territories subject to the "Government of the East India Company it is enacted as "follows: So much of any law or usage now in force within "territories subject to the Government of the East India "Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right "of inheritance, by reason of his or her renouncing, or having "been excluded from the communion of any religion, or being "deprived of caste, shall cease to be enforced as law in the Courts "of the East India Company, and in the Courts established by "Royal Charter."

The principle of section 9, Regulation VII of 1832, was that a party to a suit of one religion was not to avail himself of the laws of the religion of the other party which deprived him of any property. If a Hindu had sued a Hindu, the Hindu defendant might possibly have set up against the Hindu plaintiff, that he had no right to sue, in consequence of his having been degraded from his caste. The Regulation would have prevented a Mahomedan defendant from taking advantage of that rule of the Hindu religion, which would have deprived the Hindu plaintiff of his right by reason of his degradation from caste. Act XXI of 1850 says that "so much of any law as inflicts on any "person forfeiture of rights of property, by reason of his being "deprived of caste, shall cease to be enforced as law." It was therefore an enactment, that in suits between Hindus, the loss of property by deprivation of caste should not be enforced.

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The principle, if it can be so called, of that Regulation, which prevented the laws of the Mahomedan or Hindu religion which deprived a party of a right of property in suit between persons of different persuasions, was extended to persons of the same persuasion ; and that which could not be taken advantage of by a Mahomedan in a suit by a Hindu, so far as it related to deprivation of property by loss of caste, was not to be taken advantage of now by a persons of the same persuasion. The enactment, rather than the principle of the enactment, was extended, and the rule which was laid down to be observed in suits between persons of different persuasions, was intended to be extended to suits between person of the same persuasion.

Under the Regulation of 1832, I think it is clear, that, in any place in which that Regulation had effect, a Mahomedan in a suit by a Hindu could not have availed himself of any part of the Hindu law which deprived a Hindu of a right of property, by reason of a deprivation of caste. If so, it appears to me that by the extension of that law by Act XXI of 1850 to all parts of the territories of the East India Company, It was declared that all the rules which inflicted any forfeiture of rights of any person on account of his renouncing his religion, or being deprived of caste, should cease to be enforced as law. It appears to me that the words " being deprived of caste by reason of renouncing religion" were useless. If the renunciation of religion deprived a man of his right, his being deprived of caste by reason of that renunciation would not carry the case further. If a Hindu lost his right to property by renouncing his religion, Regulation VII of 1832 deprived a Mahomedan of his right of setting up that defence as against a Hindu, and the Act of 1850 deprived a Hindu from setting up against a Hindu that which a Mahomedan could not set up against a Hindu in that respect.

If a Hindu widow, without reference to loss of caste, held her estate only so long as she remained chaste, Act XXI of 1850 did not affect the case. If her estate was an estate only to continue so long as she remained chaste, Act XXI of 1850 did not affect the case. But If the widow of a Brahmin lost her estate by the reason of the loss of caste entailed upon her by having a child by a Sudra, Regulation VII of 1832 prevented that.

law from taking effect in suits in which both parties were not Hindus, and Act XXI of 1850 prevented that law from taking effect in suits between Hindus.

In Menu, it is said that "he who associates himself for one year with a fallen sinner, falls like him; that man who holds an intercourse with any one of those degraded offenders must perform, as an atonement for such intercourse, the penance ordained for that sinner himself. They must thenceforth desist from speaking to him, from sitting in his company, from delivering to him any inherited or other property, and from every civil or usual attention, as inviting him on the first day of the year, and the like."—Chapter XI, verses 181, 182, and 185.

Now I apprehend that the object of Act XXI of 1850 would get rid of such a defence as that. If a Brahmin should bring a suit against a Mahomedan to recover his property, that Mahomedan, after Regulation VII of 1832, could not have set up as a defence that the plaintiff had associated himself with a fallen sinner, or that he had held intercourse with any of the degraded offenders referred to in that chapter of Menu. Is it more unreasonable to suppose that the Legislature intended to prevent a Brahmin or any Hindu from setting up as against another Hindu, a defence of that nature, than to prevent a Hindu from setting up against another Hindu any defence which he might otherwise have had by reason of the plaintiff having renounced the Hindu religion?

It appears to me that it is not so; and that when the Legislature intended to prevent a Hindu from taking advantage, as against another Hindu, of any part of the Hindu law which deprived his opponent of a right of property by reason of his having renounced his religion, or of his having been excommunicated from his religion, it is not unreasonable that they should also go on and deprive a Hindu of his right to take advantage of any rule of the Hindu religion which deprived his opponent of any part of the Hindu religion by reason of his loss of caste. Looking at the case even as between Hindus, it appears to me that the removal of loss of caste cannot be more objectionable than the removal of that part of the religion which deprived a man of his right by reason of renunciation of religion, or excommunication therefrom.

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I, therefore, notwithstanding the decision of the Sudder Court in the case of *Raj Koonwaree Dassee, v. Golabee Dassee* (1), take the same view of Act XXI of 1850, which was taken by Sir Lawrence Peel, in the case to which I have referred; and I therefore am of opinion that the principle of this case is not affected by the fact that the defendant had a child by a Sudra. As far as chastity was concerned, it made no difference whether the father of the child was a Sudra or a Brahmin. It is only as regards caste that that circumstance would make any difference.

Sir Colley Scotland, in the case of *Pandaiya Telaver v. Puli Telaver* (2), seems to have taken the same view as I do of Act XXI of 1850. He says:—"Further, so to decide in this case, "would in effect be giving to illegitimacy as a disqualification, an "operation which it would be contrary to the spirit, if not the "letter of legislative enactment (see Act XXI of 1850) to "allow to degradation from caste;" treating degradation from caste simply and without reference to its being a degradation on account of the renunciation of religion or of excommunication.

The Hindu Widow's Marriage Act, XV of 1856, has also been referred to. By the 1st section it was enacted that "no marriage "contracted between Hindus shall be invalid, and the issue of "no such marriage shall be illegitimate by reason of the woman "having been previously married or betrothed to another person. "who was dead at the time of such marriage, any custom and any "interpretation of Hindu law to the contrary notwithstanding."

Then section 2 enacted that "all rights and interests "which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband, or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express "permission to re-marry, only a limited interest in such property, "with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died."

It is said that we are to infer from this that the Legislature considered that a Hindu widow forfeited her estate by reason of an act of unchastity. I draw no such inference from this

(1) 14 S. D. A. (1858, 1891.)

(2) 1 Mad. H. C., 482.

enactment. The Legislature enacted that the marriage of a Hindu widow should not be void; but at the same time they declared that the right which she had taken in her deceased husband's estate should cease on her marriage. Therefore it appears to me that the provisions of this Act have no bearing on this case. The decision of Mr. Justice Markby is affirmed with costs.

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MAGPHERSON, J., concurred.

Judgment affirmed.

Attorney for the appellant : Mr. Dover.

Attorney for the respondent : Baboo D. N. Bose.

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Markby.

SHEO NARAYAN SING (DECREE-HOLDER) v. HARBANS LAL (JUDGMENT-DEBTOR).*

Act VIII of 1859, ss. 208, 284, 285, 287, 290—Assignee of a Decree—Execution, Power of the Court to which a Decree has been transmitted for.

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June 20.

The assignee of a decree should apply to the Court which passed the decree, and not to the Court to which the decree had been forwarded under section 285 Act VIII of 1859 for execution, for the purpose of being substituted in the place of the original decree-holder.

The word "Court" in section 208, Act VIII of 1859, does not include the Court to which a decree has been transferred for execution.

Baboo Ramesh Chandra Mitter and Taraknath Paulit for the appellant.

Baboo Mahesh Chandra Chowdhry for the respondent.

THE facts of the case in reference to the point decided, sufficiently appear in the judgment of the Court, which was delivered by

MARKBY, J.—This is a Regular Miscellaneous Appeal from the decision of the Officiating Judge of Shahabad. The appeal

* Miscellaneous Regular Appeals, Nos. 120 and 121 of 1870, from the orders of the Officiating Judge of Shahabad, dated the 6th January 1870

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is by the person who describes himself as the decree-holder. It appears that, on the 14th May 1866, a decree was obtained in the Small Cause Court at Calcutta, by Bhikan Chand and Jyte Pal, against Harbans Lal and Rama Prasad. On the 13th April 1869; a certificate of non-satisfaction was asked for and obtained by the decree-holders, and the certificate with a copy of the decree was forwarded to the Judge of Shahabad for execution, under section 285 of the Civil Procedure Code. There were various applications with reference to the execution of this decree, but the execution proceedings were ultimately struck off on the 21st August 1869. On the 31st August, the decree was sold by the decree-holders to Sheo Narayan Sing, who is the appellant before us; and then on the 11th September 1869, on his application to the Judge of Shahabad, the proceedings in execution were ordered to be revived; and on the 23rd September 1869, his name was substituted for that of the decree-holders in the execution proceedings.

Now, upon this statement of the facts it was suggested that Sheo Narayan had no *locus standi* before us as an appellant in these proceedings; and that, in fact, he had no *locus standi* before the Judge of Shahabad to put the Court in motion for the execution of the decree; and after hearing the arguments of Baboo Ramesh Chandra Mitter for the appellant, we think that this objection ought to prevail.

Section 208 gives power, when a decree is transferred by assignment, to the assignee to apply for execution; and if the Court thinks proper to grant the application, the decree may be executed in the same manner as if application were made by the original decree-holder. The question then that we have to decide is whether the term "Court" in that section includes the Court to which the execution of the decree may have been transferred under section 284. Section 287 is the section which indicates the duty of the Court to which a decree may have been transferred for execution; and says: "The copy of any decree when filed in the Court to which it shall have been transmitted for the purpose of being executed, shall, for such purpose, have the same effect as a decree or order for execution made by such Court." A question has been raised somewhat similar

to this in reference to the power of the Court to which a decree is transmitted for execution to enquire into the question of limitation, and it has been held that this Court has that power, enquiry into the question of limitation being considered to be an enquiry "for the purpose of execution" within the meaning of section 237. We in no way dissent from that decision (1), but it does not decide the present case, because it is clear from section 290 that, for some purposes, even as regards the execution, the Court which passed the decree is the Court which controls the proceedings. The Court to which a decree is transmitted for execution is empowered by section 290 to stay the execution pending an application to the Court which granted the decree "for an order to stay the execution or for any other order relating to the decree or the execution thereof." It is necessary therefore to determine whether this being an application connected with the execution ought to have been made to the Judge of Sahabad or to the Small Cause Court in Calcutta. It seems to us that this application ought to have been made to the Small Cause Court in Calcutta, and not to the Judge of Shahabad. It seems to us that any other construction of the law would give rise to great confusion. For all purposes, except that of execution under the certificate and copy of decree, and, as already pointed out, for some purposes connected with execution, the decree remains in the original Court which passed it. A copy only of the decree and none of the proceedings in the suit are transmitted under section 285. The decree itself and the whole record of the suit remain in the original Court, and we think the Court which receives the decree for execution should execute it exactly as it receives it, or not at all. We think it would lead to the greatest difficulties if, in one Court, one party was recognized as being the holder of, and having the control over, a decree; and, at the same time, in another Court, another party was recognized as being in that position. Further, under section 208, it is entirely in the discretion of the Court to grant the application of the assignee or not, and the application is one which, under some circumstances, clearly ought not

(1) See *Leake v. Daniel*, Case No. 507 of 1867; March 19th, 1868.

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to be granted, and in no instance ought it to be granted merely as a matter of course. Now, the only Court which can have the proper knowledge and materials to deal with the application is the Court which tries the suit and passes the decree. Looking, therefore, generally to the terms of the law, and particularly to those of section 290, which show that, even for some purposes connected with execution, the proceedings remain in the original Court, we think that this application was wrongly made in the Shahabad Court, and ought to have been made in the Small Cause Court at Calcutta. Had it been likely that the original decree-holders were about to proceed to execute the decree in fraud of the assignee, the latter might probably by an application to the Court of Shahabad have stayed the execution pending his application to the Court of Small Causes.

The result is that Sheo Narayan not being on the record and not having even obtained the permission which is necessary to enable him to execute the decree, he had no right to appear in the Court below or in this Court. Without, therefore, entering into the merits of the case we dismiss this appeal with costs.

Appeal No. 121 is admittedly governed by this decision, and is also dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear and Mr. Justice Markby.

MIA KHAN AND MANU KHAN v. BIBI BIBIJAN AND BIBI AMNUJAN.

1870
August 13.

Mahomedan Law—Usury—Interest, Rate of—Act XXVIII of 1855—Small Cause Court Acts IX of 1850 and XXVI of 1864—Procedure

The custom of taking interest as between Mahomedans is recognised by the Courts.

The Small Cause court Acts, IX of 1850 and XXVI of 1864, form one procedure, and the High Court can therefore exercise, in cases referred under section 55 of

Act IX of 1850 (1), the extended powers given to it by section 8 of Act XXVI of 1864 (2).

Semble.—*Per* PHEAR, J. (dissenting from *Ramlal Mookerjee v. Haranchunder Dhur*) (3).—Act XXVIII of 1855 repealed the Mahomedan laws relating to usury. By “laws relating to usury,” the Legislature meant laws affecting the rate of interest.

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THE following case was referred by the First Judge of the Small Cause Court, under section 55 of Act IX of 1850, for the opinion of the High Court.

“The plaintiff sued for rupees 84-12, balance of principal and interest due on a *khat* dated 24th Falgun 1275, March 6th 1868, which, as well as translation of it, is forwarded herewith. The defendant Bibijan, did not attend, but service of summons upon her was proved. The other defendant, Amnujan, attended, and admitted execution of the *khat*, and made no defence. It was admitted that both the plaintiffs and both the defendants were Mahomedans. Baboo Kunjalal Banerjee, the Judge, before whom the case came on in the first instance, gave the plaintiff a decree for rupees 45-12, being the principal money only due on the *khat*, and refused to allow any interest. This decision he based on the interpretation given to Act XXVIII of 1855 in the case of *Ramlal Mookerjee v. Haranchunder Dhur* (3), in which it was held that that Act did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury. According to that decision, as the Mahomedan law is not repealed, and does not allow a Mahomedan to charge another Mahomedan any interest whatever

(1) Act IX of 1850, sec. 55.—“The Judges of the Court of Small Causes may in their discretion, reserve any question of law or equity on which they entertain doubts, or which they shall be requested, by either party to the suit, to reserve for the opinion of the Judges of the Supreme Court, and shall give judgment, contingent upon the opinion of the said Supreme Court, on a case which they shall thereupon be entitled to state to the said Court. Only two judges together, and shall differ in opinion, the question on which they differ shall be so referred.”

(2) Act XXVI of 1864, sec. 8.—“When

judgment is given, contingent upon the opinion of the High Court, *** the High Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order, with respect to the costs of reserving the question, and stating the same for their opinion, and otherwise arising thereout or connected therewith, as such High Court may think proper, and all orders made by the High Court under this section shall be final.”

(3) 3 B. L. R., O. C., 130.

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(see Hedaya, volume II, book XVI, chapter 8, 489), the Judge refused to give a decree for more than the principal of the *khat*. The plaintiff's pleader applied for a new trial, on the ground that the decision of the High Court, in the case above mentioned, is at variance with the intention of the Legislature, as that is to be gathered from the words used in the preamble and in section 1 of the Act. I thought that there might still be some doubt on the point, especially as the opinion of the late learned Chief Justice on the facts in the case of *Ramlal Mookerjee v. Haranchunder Dhur* (1), was sufficient to support the conclusion at which he arrived, confirming the decision of the Court below, and the expression of any opinion on this point was not necessary, and does not appear to have been raised by the parties; or concurred in by Mr. Justice Macpherson. I also thought that the terms of section 1 of Act XXVIII of 1855 (2) point in a somewhat marked manner to British statutes in the first instance, to Regulation law in the second, and lastly to "all laws in force," under which it seems to me to have been the intention of the Legislature to include Hindu, Mahomedan, and Customary Laws. I was therefore inclined to give the plaintiffs a rule *nisi*, calling on the defendants to show cause why there should not be a new trial granted. But as my colleague differed from me on this point, I have the honour to refer, for the opinion of the High Court, the question:

"Whether or not the Mahomedan law, on the subject of usury, has been repealed by Act XXVIII of 1855.

"If the High Court should be of opinion that it has not, the rule will be refused, otherwise it will be granted.

"A case turning on a similar point, but with reference to Hin-

(1) 3. B. L. R., O. C., 180.

(2) Act XXVIII of 1855, *Preamble*.—
 "Whereas it is expedient to repeal the laws now in force relating to usury: It is enacted as follows: "Section 1.—Section 30 of the Act of Parliament passed in the thirteenth year of his late Majesty King George III, intituled 'an Act for establishing certain regulations for the better management of the affairs of the East India Company, as well in India as

in Europe,' shall not apply in any part of the territories in the possession and under the Government of the said Company to any bond, contract, or assurance whatsoever which shall be made or entered into within the said territories after the passing of this Act and the several parts of regulations mentioned in the schedule hereto annexed, and all laws in force in any part of the said territories relating to usury are hereby repealed."

du law, has been referred, for the opinion of the High Court by my colleague, Mr. Thomson, and myself, and the Judges will perhaps find it convenient to consider the two cases together."

No counsel appeared on either side.

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PHEAR, J.—If, for the purpose of disposing of the matter now referred to us, it were necessary to answer specifically the question which is put to us by the learned First Judge of the Calcutta Court of Small Causes, I think I should be prepared to say that it ought to be answered in the affirmative.

It seems to me almost impossible, with sound reason, to put restriction on the generality of the words which are employed in section 1, Act XXVIII of 1855. Those words declare that a certain specified English enactment, and certain specified Regulations, and parts of Regulations and *all* laws in force in any part of the territories, which are in the possession and under the government of the East India Company relating to usury, are by that Act repealed.

I have given my best consideration to the opinion which the late Chief Justice is reported to have expressed in *Ramlall Mookerjee v. Haranchunder Dhur* (1). That opinion does not seem to have been essential to the decision of the particular case in which it was given, but it is nevertheless entitled to very great weight. According to the report of the case, Sir Barnes Peacock said :—" I do not think that Act XXVIII of 1855 was ever "intended to repeal the Hindu or Mahomedan law as to interest." He then quoted the title of the Act, the preamble, and the first section, and he added :—" That Act did no more than repeal the "various Regulations and Acts which the English Government of "India had passed on the subject of usury." With the greatest deference for the opinion of Sir Barnes Peacock, I feel it most difficult to take this limited view of the operation of the Act. I see nothing to indicate that the words "the laws now in force relating "to usury" of the preamble, and "all laws in force in any part of "the said territories relating to usury" of the first section, are to be limited in their meaning to Regulations and Acts passed by the

(1) 3 B. L. R. O, C, 130,

1870 English Government of India. If the Legislature had so intended, surely it would have used "Regulations and Acts" in the place of "laws". Instead of the "several parts of Regulations mentioned in the schedule hereto annexed, and all laws in force in any part of such territories relating to usury are hereby repealed," we should have had "the several parts of Regulations, &c., and all other Regulations and Acts in force in any part, &c."

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Neither was the mischief at which Act XXVIII of 1855 was directed, so far as I comprehend it, such as should induce us to suppose that it would be sufficient for the purposes of the Legislature that the Regulations and Acts of the English Government alone should be repealed. If this were so, probably we should be bound, if possible, to put a construction upon the words of the Legislature which would limit their operation to the bringing about this result ; but upon considering the Regulations which are specifically repealed by this Act, I find that their general effect was to place a restriction of universal operation upon the rate of interest, which should be recoverable by law under the terms of any contract of loan ; and having regard to Act XXVIII of 1855 as a whole, I can only conclude that the Legislature, at the time of passing it, was of opinion that restraint of this sort was mischievous. It appears to me indeed that the sole object of the Act was to leave the parties in any transaction entirely free to make their own terms with regard to the rate of interest, and if so, this object could only be attained by the removal of all prohibitions upon their freedom in this respect, whether imposed by English authority, or by that of the recognized ancient lawgivers. This view is, I think, not a little strengthened by the fact that Act XXVIII of 1855 followed immediately upon the repeal of the usury laws in England, and was, in appearance at any rate, an extension of that measure to India. Throughout the Act there is no trace to be found of reference or allusion to any still existing laws of prohibition, or any indication that the Legislature entertained the notion that such laws might remain in existence, notwithstanding the Act. On the contrary, every clause of the Act seems to me to negative anything of the kind. By the second section it is enacted that "in any suit"

(without a shadow of qualification) "in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties," and the application of all the other sections is equally general; the contingencies upon which they severally take effect are designated by "whenever," "in any case," and so on.

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It seems to me, then, something more than difficult to escape the conclusion that the repeal of "all" laws relating to usury, which is effected by Act XXVIII of 1855, must extend to Mahomedan laws. I will add that in my judgment the Legislature, by the use of the words "laws relating to usury" in this Act, intended to speak only of laws affecting the rate of interest, which might legally be stipulated for. The rate of interest is the sole subject of the Act from the beginning to the end. There may be, however, laws which in strictness relate to usury, yet do not meddle directly with the rate of interest, such as a law limiting the period within which an action for arrears of interest must be brought by reference to the amount to be recovered. For instance, Menu, Section 151, chapter 8, says:—"interest on money received at once, not month by month, or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time." This in substance is a law for the limitation of suits, and as such does not, I think, fall within the scope of Act XXVIII of 1855. The Bombay High Court pointed out the true character of Menu's rule in the case of *Dhondu Jagannath v. Narayan Ramchandra* (1); and by two decisions in *Khushalchand Lalchand v. Ibrahim Fakir* (2) and *Ramkrishnabhat v. Vithoba* (3), that Court also held that the rule does not fall within the repealing operation of the Act of 1855. I do not in any degree dissent from these decisions.

Unfortunately we have not been aided by the argument of counsel in this case; and therefore, having regard to the opposite opinion of Sir Barnes Peacock, I cannot do otherwise than greatly distrust my own judgment upon the question which has been proposed to us. It is consequently, with considerable

(1) 1 Bom. H. C. Rep., 47.

(3) 3 Bom. H. C. Rep., 25.

(2) 3 Bom. H. C. Rep., 23.

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satisfaction, that I find myself able to determine the matter of the reference which is before us, without making that question the turning point of my decision. The case is submitted to us by the learned First Judge, under section 55 of Act IX of 1850. By the terms of that section, the case constitutes a judgment of the Judge of the Court of Small Causes, contingent upon the opinion of this Court ; and by section 8 of Act XXVI of 1864, which extended the jurisdiction of the Court of Small Causes, " when judgment is given, contingent upon the opinion of the High Court, the High Court may either order a new trial " on such terms as it thinks fit, or may order judgment to be " entered for either party as the case may be, and may make " such order, with respect to the costs of reversing the question, " and stating the same for their opinion, and otherwise arising " thereout and connected therewith, as such High Court may think " proper. And all orders made by the High Court under this " section shall be final." Act XXVI of 1864, together with Act IX of 1850, forms one procedure ; and it appears to me that the words of the section which I have just quoted from the later of the two Acts were intended to apply as well to judgments, contingent on the opinion of the High Court, which are passed under the provisions of the former Act, as to those of the like kind which are passed under the powers given by the last Act. If this be so, I think that the large discretion which the 8th section of Act XXVI reposes in us enables us to give consideration to all the facts stated to us, and is not necessarily fettered by the form of the question upon which the judgment is made contingent. Now it seems to me apparent, on the face of the stated case, that the question proposed to us does not properly arise between the parties, for I think the rule *nisi* for a new trial ought to issue, whatever may be the extent to which Act XXVIII of 1855 operates.

The learned First Judge appears to be of opinion that, if the Act of 1855 be put upon one side, the law which the Civil Courts of this country are bound to administer between Mahomedan suitors "does not allow a Mahomedan to charge another Mahomedan any interest whatever." It seems to me that this view is erroneous. No doubt, the passage in the Hedaya to which the

learned First Judge refers, and other passages in the Koran, do, as they are commonly understood, forbid the taking of interest ; and certainly as far as I have the means of judging, I should suppose that a very considerable number of religiously inclined persons of the Mahomedan faith consider themselves bound to observe these precepts, and conscientiously keep themselves out of all transactions which appear to infringe them. But on the other hand, it is notorious that there are in India Mahomedan dealers in money, and traders of unquestionable respectability, and that it has been the practice among this class for a very long period to take interest even from their co-religionists in the way of their business. Mr Harrington in his Analysis, 1st vol. page 182, after remarking that the Mahomedan law forbids the taking of interest for the use of money upon loans from one Mussulman to another, and that the Hindu law permits interest to be taken at prescribed rates only, goes on to say :—"The Hindu legislators have expressly sanctioned and the Mussulman Government of India appear to have tolerated directly or indirectly, the customary interest of the country which, in the plan for the administration of justice proposed by the Committee of Circuit in 1772, is stated to have amounted to the most exorbitant usury." I cannot learn that our Courts have, in any case which is of authority, refused to decree interest to a Mahomedan, on the ground that he was desentitled by Mahomedan law to recover it. On the whole it seems to me that, for a considerable period of time past the prohibition of the Koran and the Hedaya against the taking of interest has not been treated by the executive and by the persons charged with the administration of justice in this part of India, as forming part of the active municipal law of the country. As a moral precept, it will, no doubt, always be influential with those who acknowledge its authority, but I think that, as a part of the municipal law, if it ever had existence as such, it has long been obsolete.

I am therefore of opinion that we ought to pass an order that the rule *nisi* do issue.

MARKBY, J.—I also think the rule *nisi* ought to issue.

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from that date, till the time of their respective deaths, the above-mentioned four brothers lived together, and formed a joint family. Up to the death of Karunamayi in 1854, she, together with Chandramani, Jagadamba, and Ajabkumari, lived together as a Hindu family, joint in estate and worship.

After the death of Karunamayi, Jagadamba filed a bill of complaint in the Supreme Court at Calcutta, praying for partition against Ajabkumari, Ramchandra Roy, as the executor of the estate of Karunamayi, deceased, and the now plaintiffs, Kamikhaprasad and Haraprasad.

Subsequently, by consent of all parties, all matters in difference in the said suit were referred to the arbitration of one Kasinath Mullick, who, on the 26th February 1858, published his award, and among other things, directed as follows:—"Selling 'their respective ryoti land, 'bati' or house, they will pay the costs 'of their respective vakeels; in that way the land, 'bati' or house 'that shall remain with the proceeds blonging to their respective 'shares, the raiment and food of Chandramani Dasi and 'Jagadamba Dasi will be supplied during their lives; they 'will be unable to make a gift or sale, &c.; should the 'proceeds of the land, 'bati,' or house not be sufficient for 'their food and raiment, and for the purity of their respective 'husbands in a suitable manner, the *jetta dharma*, then showing good reason, regulation, conformably to the *dharma shastra* 'what is expedient as necessary, according to usage, informing the 'other shareholders, they shall be able to sell the ryoti land, ' 'bati,' or house of their respective shares."

The award which directed a partition between the parties, according to the terms of *chinitnama*, or a written description of the land according to its boundaries, executed by all the parties on the 28th October 1857, was made a rule of Court on the 26th July 1858.

Subsequently to the award, the defendant Jagadamba took possession of her late husband's share in the estate.

The plaintiffs alleged that, after the award, the defendants, Chandramani and Jagadamba, for the purpose of paying costs to their attorney, Mr. W. Bedell, sold a portion of their land to one Samir Sirkar for rupees 2,400, and paid their attorney his costs

in full ; that they further, in the year 1860, without notice and without necessity, sold a house, 17-1, now 25, Mallanga, to one Brajahari Das, in the name of his wife, Ramasundari Dasi ; and that she subsequently sold the same to the defendants, Chandra-kumar Pal, Rasiklal Pal, Khettramohan Pal, and Sonamani Dasi ; and that Jagadamba was still endeavoring to alienate the remainder of her property.

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The plaintiffs prayed as follows :—

“ That it may be declared that the defendant, Srimati Jagadamba Dasi, has no power to alienate the land by the said award allotted to her (save as in the said award mentioned) as against the reversionary heirs of Srikant Roy, or at all.

“ That it may be declared that the attempted alienation in the plaint mentioned, under which the other defendants claim to be entitled, is void as against the plaintiffs, and generally against the reversionary heirs of the said Srikant Roy.

“ That the defendant, Srimati Jagadamba Dasi, may be restrained, by the order and injunction of this Honorable Court, from any further alienation of the property contrary to the provisions of the award.”

The defendant, Jagadamba, alleged that, at the time of the suit in the Supreme Court, she was without means to pay the costs arising out of such suit, and from time to time borrowed money for carrying on the said suit ; that some time in the early part of the year 1858, Mr. W. Bedell, her attorney, died, and Mr. J. R. Shiroore was appointed attorney in his place ; that after the award, viz., on 13th August 1858, she and Chandramani sold 17-1, now 25, Giri Baboo's Lane (not 25, Mallanga, as alleged by the plaintiffs), to one Ramasundari Dasi, for the sum of rupees 2,100, and thereout paid the sums borrowed, and certain costs payable to ameens and surveyors in respect of the suit ; that, on 23rd August 1859, the Administrator-General of Bengal, the administrator of the estate of Mr. W. Bedell, deceased, filed a plaint in the Supreme Court against Chandramani and Jagadamba to recover rupees 1,335-11-6, being the balance due on certain bills of costs ; that, on 2nd February 1860, judgment by default was signed in the last-mentioned suit for rupees 1,335-11-6, and the costs were taxed and amounted

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to rupees 249-9-3, aggregating rupees 1,585-4-9; that, on 16th December 1859, Chandramani and Jagadamba jointly sold 14-1 (now 18), Champatalla Lane, to one Sheikh Ahmed Baksh, son of one Samir Sirkar, for rupees 1,880, and out of the proceeds thereof paid the sum of rupees 1,585-4-9; that her income was now only rupees 4 per month. She also alleged that Chandramani should be made a party to the suit.

The remaining defendants, other than Jagadamba, jointly stated that they had purchased the premises, being 17-1 (now 25,) Giri Baboo's Lane, from Bamasundari, wife of Brajahari Das, for rupees 3,500, without notice of any irregularity in the sale to their vendor, who had been in undisturbed possession of the property for nearly nine years. They further raised the defence that the suit was premature as against them, and multifarious.

The deed of sale to Bamasundari, dated 13th August 1858, was a Bengali bill of sale.

The deed of sale to Ahmed Baksh, dated 16th December 1859, was drawn up in the English form, and in the English language.

The following issues were fixed :—

1. Are the plaintiffs the next takers of the property after the death of the defendant, Jagadamba Dasi?
2. If so, can this suit be maintained in the life-time of Jagadamba?
3. Is Chandramani a necessary party to this suit?
4. Is the suit barred by the law of limitation under clause 16, section 1 of Act XIV of 1859?
5. Is the suit multifarious?
6. Is the alienation void as against the reversioners?

Ram Chandra Roy, the guardian of the plaintiffs, in giving evidence, stated that he had not heard of the sale to Bamasundari until after the sale to Ahmed Baksh, son of Samir Sirkar. P. H. Thomas and J. A. Gomes gave evidence, tending to show that Jagadamba had endeavoured to sell to them another house, viz., 8-1 (now 11), Giri Baboo's Lane.

Srimati Jagadamba Dasi said in evidence that she effected the sale to Bamasundari through a broker, Premchand Gosain, and told him why she was selling; that in the sale to Ahmed Baksh, she had employed Mr. Shircore as her attorney, but

could give no reason why she had employed an attorney in the latter sale, and not in the former.

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Roy Chandra Roy gave evidence to the effect that he had managed Jagadamba's suit in the Supreme Court against Ajabkumari, and had advanced money to Mr Bedell, her attorney, and he produced receipts for sums amounting in the aggregate to rupees 785, running from the 17th June 1854 to the 19th April 1856. He also paid rupees 247-12 to Mr Shircore on a taxed bill of costs, and was a witness to the bill of sale to Bamasundari.

Mr Millatt (Mr Evans with him) for the plaintiffs.—A suit of this nature will lie at the instance of the reversionary heirs. See the *dicta* of the learned Judges in *Gobindmani Dasi v Shamlal Bysakh* (1). This was followed out in *Shewak Ram Roy v. Syad Mohammed Shamsul Hoda* (2), where the point now raised in the second issue was decided. In *Guru Gobind Shaha Mandal v. Anandlal Ghose Mazumdar* (3), it has been decided by a Full Bench, overruling a large number of cases to the contrary effect, that a father's brother's daughter's son inherits.

Mr Cowell (Mr Goodeve with him) for the defendants, Chandrakumar Pal, Rasiklall Pal, Srirram Pal, Khettramohan Pal, and Srimati Sonamani Dasi.—The plaintiffs cannot sue during the life of Jagadamba. In *Shewak Ram Roy v. Syad Mohammed Shamsul Hoda* (2), the learned Judges merely followed *Gobindmani Dasi v. Shamlal Bysakh* (1), which they took to be a decision on the same point, but such is not the case. It is discretionary with the Court to give a declaratory decree—*Baboo Motee Lall v. Rani Bhoop Sing* (4) *Pool Chund Lall v. Rughoobun Suhaye* (5) was a suit by reversioners to set aside a deed of sale by a Hindu widow, on the ground that the necessary money could have been raised by other means and the Court said :—“ If they had asked to have their

(1) B L R Supplemental Vol. 48.

(4) 8 W R, 64.

(2) 3 B L R, A C, 196.

(5) 9 W R 107

(3) 5 B L R, 15.

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" own right of inheritance declared, they would have been pre-
" mature, because it might happen that they would not survive
" the widows." *Mussamut Maharan v. Nanda Lal Misser* (1) was
a case in which a reversioner sued for possession on the ground
of waste ; but the Court refused to give possession, and appointed
a manager. In *Baboo Jodoo Nandan Pershad Sing v. Mussa-*
mut Nundo Kooer (2), a suit for a declaratory decree by a rever-
sioner was held to be premature. *Mussamut Pranputty Koer v.*
Lalla Futteh Bahadur Singh (3) decided that a reversioner could
not sue for a declaration of his right to succeed on the death of
the widow. The plaintiffs must make out distinct waste or fraud
on the part of the widow, and not merely a case of alienation—
Brinda Dabee Chowdhraim v. Pearce Lall Chowdry (4), nor can
they succeed, unless they shew that there is some relief which a
Court can give—*Baijnath Chatterjee v. Lakhi Mani Debi* (5)

(1) 1 B. L. R. A, C, 27

(2) 1 W R 219.

(3) 2 Hay, 608.

(4) 9 W R 460.

(5) *Before Mr Justice Kemp and Mr Jus-*
tice Markby.

BAIJNATH CHATTERJEE v LAKHI
MANI DEBI,

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Uma Shurini for rent, in which
suit her husband, intervened unsuccess-
fully ; that her husband also brought a
suit for ejectment against Uma Shu-
rini, in which suit he was again unsuccess-
ful ; and then the husband brought a
suit in the Civil Court against Baksu
Sing, Uma Shurini, and the plain-
tiff herself ; and in that also he was un-
successful ; and then she ends by an
allegation which we are quite unable to

understand,—namely, that this last unsuccess-
ful attempt on the part of her husband
to establish his right against Baksu and
Uma Shurini and herself constitutes her
cause of action in the present suit.

The first objection taken in special
appeal was not clearly taken below ; but
it certainly seems clear that the plaintiff
has not disclosed any cause of action in
the plaint. She does not say that there

have been any of those summary proceed-
ings in which she herself having failed is
referred for redress to a regular suit, nor
can I see that she alleges any sort of in-
jury as having accrued, or even as likely
to accrue, from what has taken place. It
follows, therefore, that no suit will lie
under the provisions of section 15 of Act
VII of 1859, because, generally speaking,
no declaration of right can be made, un-

See also

15 B. L. R. 78

MURRAY J (KEMP, J concurring).—
I think it is quite clear that the finding
of the lower Appellate Court is wrong.
The plaintiff's case that one biga
of land within stated boundaries belong-
ed to one Raghutan as rent-free lakhi-
raj land ; that Raghutan had an imme-
diate tenant of the name Baksu Sing,
who had an under-tenant of the name
Uma Shurini ; and that she the
plaintiff, purchased from Raghutan,
not in the year 1233 (1856) as the
Judge in the lower Appellate Court
says, but on the 8th Paus 1272 (Decem-
ber 20th, 1865). Then she goes on to
say that her husband, who, she says, is in
this matter separate from herself, pur-
chased the rights of Baksu Sing ; and
that she has been in possession and
receiving rent through her husband ; but
that the defendant, Baijnath, had sued

Bristow v. Whitmore (1). The suit is also multifarious. The purchasers have nothing to do with Jagadamba's management. They have made all necessary enquiries, which is all that is required of them. They are not bound to see to the application of the purchase-money.

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Mr. Kennedy (Mr. Phillips with him) for Jagadamba Dasi.—

This is a suit brought under section 15 of the Civil Procedure Code; that section is in the same words as section 50 of 15 & 16 Vic., c. 86. The English cases show that it only gives the Court of Chancery power to refrain from giving consequential relief; it does not give it jurisdiction to hear cases, which it had no power to hear previous to the passing of the Act—*Jackson v. Turnley* (2), *Lady Langdale v. Briggs* (3). This Court administers law or equity, as administered by the late Supreme Court, and the late Supreme Court acted upon the principles of equity as laid down by the Court of Chancery in England. The jurisdiction of this Court then will not be extended by section 15 of the Code of Civil Procedure to any larger extent than that of the Court of Chancery was extended by 15 & 16 Vic., c. 86, s. 50. One of the principles of the Court of Chancery was that, where no present relief could be afforded, a suit of this nature would be premature. A strong illustration of the incapacity of the Court of Chancery to make a declaration of right, until the facts have arisen which call for a decision of the right, is shown by *Bull v. Pritchard* (4), which was decided as regards the personal property in 1826; but as regards the real property which was passed by the same words, not until 1870 under a separate will. The plaintiffs, moreover, have no right, title, or interest; it has been held that the interest of a reversionary heir is not such an interest as can be attached in

less the plaintiff can show that there was some relief which the Court could have given.

(1) 4 K. & J., 743.

(2) 1 Drew., 617; S. C., 23 L. J. Ch., 949.

(3) 26 L. J. Ch., 27.

The plaintiff's suit will be dismissed, and this appeal decreed with all costs in the Court below and in this Court.

(4) 1 Russ., 213 in 1826, and 5 Hare, 567 in 1847.

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execution of a decree—*Bhubunmohun Bannerjee v. Thacoordoss Biswas* (1).

Mr. Millett in reply.—It is true *Gobindmani Dasi v. Shamlall Bysakh* (2) was only a *dictum* on the point now before the Court, but *Shewak Ram Roy v. Syad. Mohammed Shamsul Hoda* (3) was a considered decision. The plaintiffs do not sue for possession, nor for a declaration of their right on the death of the widow, but merely for a declaration that the widow has no power to alienate as against the reversionary heirs of Srikant. *Brinda Dabes Chowdhrair v. Pearee Lall Chowdry* (4) is the only case cited on the other side that is to the point, but the learned Judges appear to have mistaken the purport of the decision in *Pranputty Koer v. Lalla Futteh Bahadoor Singh* (5) on which case they based their decision. In *Pranputty Koer v. Lalla Futteh Bahadoor Singh* (5), the plaintiffs asked for a declaration of their right to possession on the death of the widow, and their suit was dismissed on the ground that their right being only a contingent one could not then be declared. In *Srinath Gangopadhya v. Mahes Chandra Roy* (6), which was a suit by an heir after the death of the widow to recover possession of property from an adopted son, on the ground that the adoption was illegal, in deciding that the cause of action accrued to the heir on the death of the widow, and not on the date of the alleged adoption. PEACOCK, C. J., says:—"I do not mean to say that a reversionary heir might not have a cause of action during the widow's life to set aside an invalid adoption, but that would be in the nature of a declaratory suit."

MARKBY, J.—This is a suit brought by Kamikhaprasad Roy, Haraprasad Roy, and Bhawanicharan Roy, an infant, by his guardian. The plaintiffs are the sons of one Srimati Mani Dasi, daughter of Shamchand Roy, who died in 1841, leaving a widow and his daughter him surviving. Shamchand had four brothers, and they were all the sons of Giridhar Roy. In the life-time of all the sons, the four youngest separated from their elder brother,

(1) 2 Ind. Jur., N. S., 277

(2) R. L. R., Supplemental Vol., 43.

(3) 3 B. L. P., A. C., 196.

(4) 9 W. R., 460.

(5) 2 Hay, 606.

(6) 4 B. L. R., F. B., 3.

and re-formed themselves into a joint family ; the only one who left issue was Shamchand. Subsequently the widows had some disagreement between themselves and Ram Chandra, which led to a suit for partition between them ; that suit was referred to arbitration, and an award made partitioning the property of the family. This suit is brought against Jagadamba, widow of Srikanth, and Rasiklal Pal, together with the other defendants ; the prayer is to declare that Jagadamba has no power to alienate the land in question, and against the other defendants, that the alienation may be declared to be void as against the reversionary heirs. In the course of evidence, it was proved that Haraprasad was of the age of seventeen years ; and as it has been held that a Hindu does not come of age till eighteen, I ordered Ram Chandra to be appointed his guardian, and the plaint to be amended accordingly.

It appears there were two alienations by Jagadamba, both of which were made jointly with Chandramani, but by each in respect of their own shares. One bears date the 13th August 1858, and the other the 16th December 1859, and it is the deed which bears the first date that is now sought to be set aside. There were several preliminary questions raised by the issues ; firstly, whether the plaintiffs were next takers—that point was abandoned on the part of the defendants ;—secondly, whether Chandramani was a necessary party, but I think she was not because, although she professes to convey jointly, she had no joint interest with Jagadamba. On the other hand, it was contended there was a misjoinder in suing the other defendants jointly with Jagadamba. I am by no means prepared to say that Jagadamba was a necessary party ; but I am not prepared to dismiss the suit on that ground, as it involve no complication. Another question much discussed was whether the suit can be brought in the life-time of Jagadamba. But I ought, I think, to follow what appears to me is the preponderance of the decisions, and hold that the suit can be maintained. *Shewak Ram Roy v. Syad Mahommed Shamsul Hoda* (1) is a distinct decision, on the point, and I also think there is, although not a decision, an

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(1) 3 B. L. R., A. C., 196.

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expression of opinion almost amounting to a decision in *Gobindmani Dasssi v. Shamlall Bysakh* (1). It was there held that a conveyance by a Hindu widow, for other than allowable causes, is not an act of waste destroying the widow's right, and vesting the property in the reversioners; and the argument pressed on the Court against that view was that the heir had no power or opportunity to come in, and the Court say:—"But our decision will not preclude the reversionary heirs, even during the life-time of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient cause to justify the interference of the Court." This seems to me an expression of the opinion of the Court on a point discussed before it in answer to an argument pressed upon it; and, therefore, it would not have been delivered without careful consideration. The decision the other way is *Brinda Dabee Chowdhrian v. Pearee Lall Chowdhry* (2), where MACPHERSON, J., in delivering judgment, says:—"The mere fact of making alienations that are not binding after the widow's death on the reversioner will not entitle the reversioner to come into Court and get such a remedy as he asks for in the present suit;" that is the view of the law the Court then took; but it seems to me the learned Judges had not the decision of *Mussamat Pranputty Koer v. Lalla Futteh Bahadoor Singh* (3), to which they refer, fully before them; that was a suit by persons asking to have it declared that they were entitled to take on the death of the widow, and the learned Judges used expressions which appear to me to leave the question now before us an open one. It seems to me they expressly guard themselves from saying that a suit of this description will not lie. Apart from these decisions, there are strong reasons for allowing such a suit to be brought; it would be extremely dangerous to allow a widow to alie-

(1) B. L. R., Supplemental Vol., 48.

(3) 2 Hay, 608.

(2) 9 W. R., 460.

nafe, and to shut out the reversionary heirs, without some check being put upon her. I think, therefore, it is best to follow the law, as it appears to me at present settled. That disposes of the law points, and it remains for me to decide as to the merits. I have to see whether the purchaser acted as a careful man would act in making the purchase. A purchase does not fail because the money is not appropriated in the way it ought to be, nor if the necessity does not exist to the extent or in the exact manner it is said to exist. I also understand there is no absolute rule as to the person on whom the burthen of proof lies, and all the circumstances ought to be taken into consideration, in considering whether the defendant can make out a case, and lapse of time is one of those circumstances. This alienation took place twelve years ago. It was not to the persons now defendants, but to Brajahari Das, in the name of his wife and sold by him to the defendants in this suit. It is a peculiar circumstance too connected with this case that all the facts now known to Ram Chandra must have been known to him when the sale took place, and if he had had any grievance he would have brought the suit before. The position of Jagadamba is not, I think, quite that of an ordinary Hindu widow. It is slightly modified by the award. I think it is clear also that Brajahari purchased with notice of the award. Roy Chandra states he informed him of the existence of the award, and that Jagadamba was selling to pay the costs of the suit. The plaintiffs therefore must stand or fall by the fact as to whether or not she was empowered by the award to sell this property. She was empowered by it to do so. Each partner has given her power to sell for costs. It is also expressed in the award that, under certain circumstances, the parties to it might sell on giving notice. But no notice having been given, I think that reduces the defendants to the position of proving that she sold for costs. I think Roy Chandra's evidence was reliable; he was well acquainted with business, and able to manage a transaction of this sort. He has, no doubt, made a slight error as to the date of the transaction. But he proves to my full satisfaction that he advanced money to Mr. Bedell, the attorney for Jagadamba, for expenses out of pocket. The receipts were produced, and such payments

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amount to rupees 785. Besides these, there was a payment of rupees 247 to Mr. Shircore, an attorney, in respect of a bill of costs due to him from Jagadamba, and rupees 64 to persons who measured the property. All these sums carried interest. I am satisfied with his evidence, and that the transaction with Brajahari was in accordance with the award. The only difficulty is whether the fact of the property having been sold for rupees 2,100 was in excess of the power granted by the award; but, upon consideration, I have come to the conclusion it is not. Jagadamba could not have measured off a certain amount of the property so as exactly to meet the debts. Moreover, it is impossible to say exactly what the property would fetch. This amount of rupees 1,096 was not all the costs of the litigation, and it is clear rupees 2,100 would not have covered the whole costs, because there was a subsequent sale, the money of which was also applied in payment of costs. It was, to my mind, the more prudent course for the widow to sell once for all; it is true she did not apply the balance wholly in payment of costs, but Brajahari cannot be affected by this. Roy Chandra says the balance was applied in payment of attorney's costs, and also for religious purposes and maintenance, but for these a notice was necessary. As the matter stands, however, that appears to me, in no way to affect Brajahari's purchase. It seems to me, considering the circumstance of lapse of time, and that defendants did not purchase direct from Jagadamba, that they have fairly proved that the sale to Brajahari was a good one. This disposes of the first two prayers in the plaint. The third prayer depends on certain evidence, which, notwithstanding Jagadamba's denial, I believe to be true. I do not say that the prayer might not have been a good one, if it had been proved that Jagadamba was guilty of waste, but without any such act, I have great doubts whether under the circumstances it can be granted. The suit will, therefore, be dismissed with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiffs : Mr. Carapiet.

Attorney for the defendants : Messrs. Gray and Sen, and Baboo N. N. Sen.

[PRIVY COUNCIL.*]

FELIX LOPEZ (PLAINTIFF) v. MADDAN THAKOOR,
BRIJOMOHAN THAKOOR, AND HARI MOHAN
THAKOOR (DEFENDANTS).

1870
July 11.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Diluviation of Land—Rights of Proprietors to Accretion.

Where property is wholly submerged by a river, any land forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor.

The decision in *Kattemonee Dossee v Ranees Monmohinee Dabee* (1) is erroneous in not regarding the site of the increment.

See also
14 B.L.R. 222.
14 B.L.R. 271.
10 B.L.R. 429.
9 B.L.R. 150.
8 B. L. R. 75.

THIS was an appeal from a decision of the High Court at Calcutta, dated 28th November 1865, reversing a decree of the Principal Sudder Ameen of Bhagulpore, dated 9th February 1865.

The appellant was the owner of Mauza Maghajan, the respondents were owners of the Mauza Burrari, mauzas contiguous to each other on the south bank of the Ganges in Bhagulpore, the former mauza being north of the latter.

In 1840, a portion of the land being washed away, and fears being entertained as to a confusion of boundaries, a plan was, by consent of the appellant and the respondents, drawn up showing the boundaries as they existed of old: this is the *tanabandi* referred to in the judgement. Subsequently the appellant's mauza was completely submerged, but he continued to pay Government revenue for it, the description and measurement of the mauza being recorded.

In 1848, the river began to recede towards the north, and sandy accretions began to form on the site of the old Mauza Maghajan, but contiguous to the unsubmerged land of Burrari.

* *Present* :—The Right Honorable Sir James Colville, Sir Joseph Napier Lord Justice James, and Sir Lawrence Peel.

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In that year a survey map was made by the authorities, in which the old boundaries of Maghajan, including the submerged portion, were retained.

In 1861, the alluvial deposit increased so as to make it fit for cultivation, and the appellant petitioned the Magistrate, under Act IV of 1840, section 5, to measure and fix the boundaries and give him possession. The respondents claimed the land as being in their possession, and the executors of Matilal Seal, who had a zemindari to the eastward, claimed the accretions as belonging to them.

The Magistrate decided that he had not jurisdiction to determine the case, and in 1864 the appellant brought the present suit against the respondents and the Seals. The Seal defendants filed a disclaimer. The appellant relied on the ground being on the actual site of his old mauza: the respondents, in addition to other defences (which it is unnecessary to allude to), relied on the old mauza having been wholly destroyed and the land now in dispute being an accretion to their mauza. The appellant, in his written statement, particularly referred to the *tanabandi* as having been made to avoid future boundary disputes, and the *factum* of the *tanabandi* was admitted, although its applicability to the new state of affairs was denied.

The principal Sudder Ameen decided in favor of the appellant, on the ground that the land was formed on the old site of his mauza, the boundaries of which were ascertained by the *tanabandi*.

The respondents appealed to the High Court, when Mr. Doyne, who then appeared for the now appellant, felt himself bound, by a decision of the Court in *Kenny v Beebe Summeeroonissa* (1), to admit that as a re-formation on the original site of the mauza, Mr Lopez could not claim the land, but he relied on the *tanabandi* as showing an agreement by the parties to respect the ancient boundaries in the event of a submersion and reappearance.

Mr Justice L S Jackson and Mr. Justice Glover, following the admissions, declined to give to the *tanabandi* the

position claimed for it, as no mention was made in it that should any one mauza be diluviated and afterwards re-formed, it should be the property of the original owner of the site ; it is simply " a laying down of certain landmarks, the reason of which " appears to us quite intelligible when the old and erroneous " view of the law regarding alluvion is considered. The *tana-* " *bandi* would have been of very great use in fixing what had " been the original site of any of the mauzas had they been " diluviated, and would therefore, supposing that re-formations " on such sites were recognized as the property of the " landowner whose land had been washed away, have been a " very cogent means of proof as to the rights of the parties " We do not think that on such a vaguely worded " document we are justified in inferring a contract of any kind " whatsoever : still less one which would take the parties out of " the law provided in such cases."

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Mr. Lopez having appealed against this decision, the case now came on for hearing.

Sir R. Palmer, Q. C., and Mr. Leith for the appellant.—The terms of Regulation XI of 1825, section 4, cannot be applied to the present case so as to entitle the respondents to the property, this being a case where the land had formed on a site which could be recognized as the appellant's estate.—Regulation XI, clause 5, section 6 ; *Romanauth Thakoor v. Ohundernarain Chowdhry* (1) *Mussamat Iman Bandi v. Hurgovind Ghose* (2), *Bundhoo Singh v. Syud Hossein Alee* (3). The case followed by the High Court of *Kenny v. Beebee Soomeeroonissa* (4) rests on a case in the same volume, *Kattamones Dossee v. Ranees Monmohinees Dabee* (5), and the principle is erroneous that regard is not to be had to the site of the increment. See also Co. Lit. 4a, Bracton. Bk. 2, Ch. 2, *Hale de Jure Maris*, p. 15. The admission made by counsel below cannot affect this case, as even a wrong decision, being that of the Full Bench, could be only set right on appeal.

(1) Marsh. H. C. Rep, 126.

(4) 3 W. R., 68.

(2) 4 Moore's I. A., 403.

(5) *Id.*, 51.

(3) S. D. A., 1859, 1383.

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Mr. Field, Q. C., and Mr. Doyne for the respondent.—The mauza having wholly disappeared, this must be looked on as an accretion to the adjoining land.—Regulation XI of 1825, section 4, *The King v. Lord Yarborough* (1), *In re The Hull and Selby Railway Company* (2), *Kattemonnee Dossee v. Ranees Monmohinee Dabee* (3), *Kenny v. Beebee Someeroonisa* (4), *Baboo Gooman Bhunjun Singh v. M. R. Mohassur Buksh Singh* (5).

Their LORDSHIPS delivered the following written judgment :

The plaintiff in this case, Felix Lopez, was the proprietor of very considerable estate, a mauza, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated;" that is, the surface soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand sowing, had become hard and firm soil, capable of being cultivated in the usual manner. The plaintiff says: "This was my property; the Ganges, which "swallowed it, has again yielded it up, and I claim my property, "which, having been buried and lost to sight, has again re-appeared."

The rule of the English law applicable to this case, is thus expressed in a work of great authority (Hale, 'De Jure Maris,' p. 15): "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so yet that there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and boundary on the firm land the same can be known, or it be by art or industry regained, the subject doth not lose his property. "If the marks remain or continued, or the extent can reasonably be certain, the case is clear." And in another place, p. 17, he

(1) 2 Bligh, N. S.; 147; 3 B. & C., 91.

(4) 3 W. R., 68.

(2) 5 M. & W., 327.

(5) S. D. A., 1854, 49.

(3) 3 W. R., 51.

writes thus : "But if it be freely left again by the reflux and
 "recess of the sea, the owner may have his land as before, for
 "he cannot lose his property of the soil, although it for a time
 "becomes part of the sea, and within the admiral's jurisdiction
 "while it so continues."

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This principle is a principle not merely of English law, not a principle peculiar to any system of municipal law, but it is a principle founded on universal law and justice ; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

There is, however, another principle recognized in the English law (derived from the civil law), which is this,—that where there is an acquisition of land from the sea or a river by *gradual, slow, and imperceptible means*, there, from the supposed necessity of the case and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land.—*The King v. Lord Yarborough* (1). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea—*In re The Hull and Selby Railway Company* (2). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind has never been judicially determined.

This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the defendants' case is based. This law is to be found in the Regulation XI of 1825, a Regulation for carrying out the
 (1) Bligh, N. S., 147; 3 B. & C., 91. (2) 5 M. & W., 327.

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rules to be observed on the determining of claims to lands gained by alluvion, or by the dereliction of a river or the sea. There is a recital in that Regulation as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th section of the Regulation. By that section it is provided that, "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether the land be held immediately from the Government, or from any intermediate landowner." And the defendants' contention is, that the plaintiff's land having been wholly submerged, so as to make their (the defendants') land the river boundary, the subsequent recession of the river has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the plaintiff's MAUSA.

It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says,—"I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State ; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable.

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And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th section did not govern the case, and that the question would have to be determined by the general principles of equity, to which all cases not in terms provided for are referred by the 11th section. Those principles would not give the plaintiff's property to the defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bayley, and Mr. Justice Kemp, in the case of *Romanauth Thakoor v. Ohundernarain Chowdhry* (1) ; and after full consideration, it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of section 4, Regulation XI of 1825, viz., they do not become the property of the adjoining owner, but remain the property of the original owner.

And the same point arose in a case in this Court of *Mussamat Imam Bandi v. Hurgovind Ghose* (2). It is there said,—“ The

(1) Marsh. H. C. Rep., 150.

(2) 4 Moore's I. A., 403.

1870 " whole of the district adjoining the land in dispute, as well as that
 FELIX LOPEZ " land itself, is flat, and very liable to be covered or washed away
 " by the waters of the Ganges, which river frequently changes its
 MADDAN THA- " channel. The land in dispute was inundated about the year
 KOOR, BRIJO- " 1787; it remained covered with water till about 1801, and then
 MOHAN THA- " became partly dry, until in the year 1814 it was again inun-
 KOOR AND " dated. After this period it once again re-appeared above the
 HARI MOHAN " surface of the water, and by the year 1820 it became very
 THAKOOR. " valuable land." That is a state of things very singularly like
 what as occurred in this case.

In that case it was held as follows :—" The question then is
 " to whom did this land belong before the inundation? Who-
 " ever was the owner then remained the owner while it was
 " covered with water and after it became dry."

This authority appears to their Lordships conclusive in the
 present case.

In a subsequent case, however, *Kattemoness Dossee v. Ranees Monmohinee Dabes* (1), it was held by a Court comprising
 Justices Trevor, Loch, Bayley, and Morgan that all gradual
 accessions from the recess of a river or the sea are an increment
 to the estate to which they are annexed, without regard to the
 site of the increment, and a distinction was taken between the
 two cases; and it seems to have been considered that the former
 case did not apply to any case where the property was to be
 considered as wholly lost and absorbed, and no part of the
 surface remained capable of identification; where there was a
 complete diluviation of the usable land, and nothing but a use-
 less site left at the bottom of the river. Their Lordships, how-
 ever, are unable to assent to any such distinction between surface
 and site. The site is the property, and the law knows no differ-
 ence between a site covered by water and a site covered by
 crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they
 do not hold that property absorbed by a sea or a river is, under
 all circumstances, and after any lapse of time, to be recovered
 by the old owner. It may well be that it may have been so

completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent, and honest means of preventing the necessity of any dispute arising by interchanging the *tanabandi* which has been put in evidence, but the plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged manza recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore, of opinion that the property now being capable of identification by means of that *tanabandi* and otherwise, the property having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property; and they will therefore recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal Sudder Ameen, and that the costs of the litigation both below and here should be given to the appellant, the plaintiff.

Appeal allowed.

Agent for the appellant : *Mr. Wilson.*

Agent for the respondent : *Messrs. J. H. & H. R. Henderson.*

ALEXANDER JOHN FORBES (PLAINTIFF) *v.* MIR

MAHOMED TAKI AND OTHERS (DEFENDANTS.)

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

P. C.

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July 26.

Sanad, Rent-free—Jaghir and Service Tenures—Resumption—power of Zemindar to resume—Government Sale, Effect of, on Jaghirs—Admission in other Suit when Evidence.

See also
11 B.L.R. 72.

In 1776 a rent-free sanad was granted to M. for having put down wild elephants, the consideration in future being to cultivate and keep up a body of men, and take

* Present :—THE RIGHT HON'BLE LORD CAIRNS, SIR JAMES COLVILLE, SIR JOSEPH NEEDE, AND SIR LAWRENCE PEARCE.

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care of the ryots. M. died, and a fresh sanad was in 1786 granted to K. and R., they being thought to be his heirs; but in 1807, M.'s true heirs having established their title, the Government gave them a fresh sanad in lieu of the one to K. and R., reciting the circumstances; both these sanads were to cultivate, keep up a body of men, keep off elephants, and attend to the safety of the ryots. Held that this was not a servise tenure that could be resumed, and the subject of servise tenures was explained.

The zemindari in which these lands were situated was settled in 1802, and was in 1850 sold for arrears of Government revenue; the appellant claimed to set aside the sanad of 1807, on the ground that Government had no right to give such a sanad, but he contended that, if it had, it could be set aside by a purchaser at a Government sale. Held, that the sanad was not a new grant, but a confirmation of the one made before the decennial settlement, and that Government was competent to give such confirmation.

An admission by a jaghirdar in a suit brought by Government to assess the lands that the lands were comprised in a zemindari, is evidence of that fact in a suit by the zemindar to resume those lands.

THIS was an appeal from a decision of the High Court (BAXLEY and PHEAR J J) at Calcutta, dated 31st March 1865.

The suit was brought by the appellant against the original respondents, and the Government, for the resumption of 9,000 bigas of land which the plaintiff claimed as belonging to his zemindari of Sultanpur, and which were comprised in a sanad from Government to the defendants, dated 10th January 1807, whereby that land was granted to them rent-free, which grant the plaintiff sought to set aside. The plaintiff also claimed 2,000 bigas as being held by the defendants in excess of the grant.

The zemindari was first premanently settled with Rani Indrawati in 1802; and in the kabuliat granted by her on that occasion, she engaged not to interfere with former settlements made by the Government, nor to resume any lands without their sanction.

The history of the 9,000 bigas was shortly this:— In 1775 a sanad was granted by Government to Mir Syad Ali, which, after reciting that it was given on account of his having prevented the incursions of elephants, proceeded in the following words:—
“ 9,000 bigas of, &c, have been granted from 1183 Mulki as a
“ jaghir to the said Mir, agreeably to a *chackband* that, culti-
“ vating the lands, and keeping up a body of men, he will take
“ care of the royts of the said pergunna, to the end that there may

"be annually an increase in the cultivation, and settlements in the said pergunna." 1870

On the 1st April 1786, a second sanad was granted, which, after reciting the death of the Mir, "without a fixed jaghirdar," and that Mir Abdul Hossein Khan and Mir Ali Riza, the brother and nephew of the deceased were capable of performing the duties, it proceeded thus:—"Therefore, in consideration of the merits of the late Mir, the jaghir lands have been continued and affirmed as heretofore, agreeably to the foregoing provisions, to the said Khans. They will cultivate the same, and keeping up a body of men, will keep off the incursions of the elephants, and attend to the safety of the tenants; and the produce, whatever may remain after expenses, they will appropriate with their children. It is required you will consider the said individuals fixed jaghirdars, and exempt them from any call for services and from all demands. You will not call for fresh sanads from them every year."

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Litigation then arose between persons claiming as heirs of the first grantee against the grantees under that second sanad, which resulted in a decree declaring these second grantees to be trustees for the heirs; but as the Court considered they could not order the grantees to transfer the benefit of the sanad to the proper heirs, without leave of the Government, they were kept in possession.

On the 10th January 1807 (five years after the settlement of the zemindari), a fresh sanad was granted to the heirs of the original grantee: this sanad recited the proceedings by these heirs, and granted to them a sanad in the same terms as the second sanad granted to the deceased's brother and nephew.

The respondents were the representatives of those heirs and the persons entitled under that sanad, if the sanad were valid, and the lands could not be resumed.

In the grants the property was always described as 9,000 bigas "from the area of Ramgunj, Pipra, &c., villages on the border of the Pergunna Sultanpur."

In 1845 the Government took proceedings against the respondents for the assessment of the 9,000 bigas as rent-paying land; and the grantees having relied on the sanads, they were called upon

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to define the lands claimed by them, and their mooktear pointed out that the jaghir lands were comprised within the Talooks Ramgunj and Gurka, in the Sultanpur Pergunna, and were therefore comprised in the lands settled with the zemindar in 1802. In this enquiry the zemindar did not interfere, and the Collector, being satisfied as to the sanads, ordered the claim for assessment to be dismissed.

The Pergunna Sultanpur, being put up for sale for Government revenue in 1850, was sold to Pratap Sing, who sold to the appellant, Mr Forbes, who thereupon brought the present suit for resumption, basing his right on two grounds: 1st, that the grants were for services in putting down wild elephants, which services were no longer required, and the appellant, as zemindar, did not wish them continued; 2nd, that the Company had in 1807 no power to grant a sanad of lands comprised in the settlement of 1802.

He also claimed 2,000 bigas as held by the respondents without any title, but this point rested solely on a question of fact which it is not necessary to go into.

The Principal Sudder Ameen held that the lands in question were comprised in the settlement of 1802; that the respondents held under a service tenure; and that the service being no longer required, the zemindar was entitled to resume; and that as to the last sanad, it was invalid, as comprising lands already settled with the zemindar.

The respondents appeal to the High Court, which Court, in the judgment now appealed against, decided that the appellant who had, in proof of the lands being comprised in the settlement, filed a copy of the quinquennial settlement paper and a copy of the Collector's proceedings in the suit by Government, containing a statement of the admission by the mooktear above alluded to, had not proved that the 9,000 bigas were part of the zemindari. After expressing their dissatisfaction with the proof of the quinquennial register, their Lordships said as to the admission of the mooktear:—

“The resumption proceeding recites that the defendant ‘jaghirdar’s mooktear was asked whether these lands were ‘istemrari or rent-free; that he replied that he could not say, but

" would enquire ; that on being subsequently asked, he pleaded
 " that the quinquennial register filed by him was proof that the
 " 9,000 bigas in Talook Ramgunj sought there to be resumed and
 " assessed by Government already paid rent rupees 850. There
 " is no copy or record of proof of what quinquennial register
 " was filed in that suit. There is no copy or record of the dep-
 " position or statement of the mooktear or his power of attorney,
 " or of his signature to any paper showing that he made such a
 " statement (1). The zemindar was no party to that suit. It is
 " true, the claim of Government was for 9,000 bigas held by the
 " defendant in Ramgunj, and that the decretal order dismisses
 " the claim, because, the lands had already been assessed. We, how-
 " ever, think on this point the ruling in the *Sudder*, in the case of
 " *Roy Prankissen Mitter v. The Collector of Saran* (2), is cor-
 " rect, viz., that a party's statement in Court, regarding a dis-
 " pute with another party, does not create a valid title in a
 " third party not in that suit, whether those statements were
 " made in good faith or bad faith."

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The Court then decided that the sanad of 1807 was only a confirmation of the old sanads granted before the settlement of 1802, and that they were valid hereditary rent-free grants, and not "*māl chakiram* sanads," and they reversed the decision.

Mr. Forbes appealed to Her Majesty, and the appeal now came on for hearing.

Sir R. Palmer, Q. C., Mr. Leith, and Mr. Forbes for the appellant.—The grants were for services to be performed, and therefore the lands could be resumed when the service could no longer be performed. They are *chakiran* lands within the meaning of Regulation VIII of 1793, section 41. *Chakiran* lands are defined in Lord Kingsdown's judgment in *Jaykishen Mookerjee v. The Collector of Burdwan* (3). If the service be not performed, they are resumable—*Bhugoo Rae v. Azim Alee Khan* (4). The continuation of the service is the test of the validity of the grant so as to oust the right of resumption—*Nilmony Sing Deo v. Ramgolal Singh Chowdhry* (5); *Mahbub Hossein v. Patasu Kumari* (6).—

(1) The document put in was a copy of the Collector's decision, embodying what purported to have taken place, and what was stated by the mooktear.

(2) S. D. A., 1852, 582.

(3) 10 Moore's I. A., 16; see 41.

(4) S. D. A., 1858, 84.

(5) Marsh. H. C. Rep., 518.

(6) 1 B. L. R., A. C., 120.

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The only objection is where the Government refuses consent. *Baboo Koolodeep Narain Sing v. Mahadeo Singh* (1) The High Court ought to have held that the lands were within the zemindari, and were wrong in rejecting the admission of the mooktear made in the assessment suit. The last sanad was not a confirmation of the former sanads, but was a new grant of land which, being comprised within the zemindari, the Government had no right to grant. But even if this grant had been made with the consent of the zemindar, the sale for arrears of Government revenue entitled the purchaser to set it aside—Act I of 1845.

Mr. Doyne and Mr Cave for the respondents.—The lands in question form no part of the zemindari lands on which rent was paid. They are in no sense service lands. These are quite different from ghatwal and chakiran lands. The ghatwal tenures are of two kinds: 1st, those created by the zemindar in lieu of pay since the decennial settlement; 2nd, hereditary ghatwal holdings before the decennial settlement. The lands here are jaghir lands, a holding as independent as that of the zemindar, though within his geographical limits. The grant was a jaghir, entitling the grantee to hold rent-free thenceforth (2). It is very different from chakran (3)—Regulation XXXVII of 1793, section 15.

The following cases were then referred to:—*Joykishen Mookerjee v. The Collector of Burdwan* (4), *Munrunjun Singh v. Rajah Lelanund Singh* (5), *Baboo Koolodeep Narain Sing v. Mahadeo Singh* (1), (Sir B. Peacock's judgment); and distinctions were shown to exist between the cases of *Nilmony Singh Deo v. Ramgopal Singh Chowdhry* (6); *Mahbub Hossein v. Patasu Kumari* (7). At the time of the settlement of 1802, the Government had no interest in the land; it being in the jaghirdars. The last sanad is a confirmation of one made before the decennial settlement, and is not effected by a Government sale, Act I of 1845, section 26.

(1) Case No. 290 of 1865; 8th Sept. 1866. (5) 3 W. R., 84.

(2) Wils. Glossary, 224.

(6) Marsh. H. C. Rep., 518.

(3) Harr. Anal., 405, 407, & 417.

(7) 1 B. L. R., A. C., 120.

(4) 10 Moore's I. A., 16; see 41.

Sir. *R. Palmer*, Q. C., in reply.—These lands were included in the zemindari ; and though no rent was paid to the zemindar, he paid rent for them to Government ; and the grant being in 1807, the zemindar must be taken to have acquiesced in it, but this does not make it good as against a purchaser at a Government sale. The respondent shows no title before the settlement. The term jaghir is not incompatible with a service tenure. *Bhugoo Rae v. Azim Alee Khan* (1). The decision cited, as given by Sir B. Peacock, is of no avail, unless the grant relied on were anterior to 1802. He referred in chronological order to the cases bearing on service lands, citing, in addition to those above mentioned, *Hurreenarain Ghose v. Mussamut Urnoo Dassee* (2), *Moharaja Sreeschunder Rae v. Madhab Mochee* (3), *Tekayet Jugmohun Singh v. Raja Neelamund Singh* (4).

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Their LORDSHIPS gave the following written judgment :—

The appellant is the owner of the zemindari right in Pergunna Sultanpur, and Talook Rimai, in Zilla Purneah. These mehals were purchased by him in April 1851, from one Pratap Sing, who, on the 24th of July 1850, had purchased the estate of which they then formed part at a sale for arrears of Government revenue : and the estate so purchased by Pratap Sing had once been part of a far more extensive zemindari, which, in 1802, was first permanently settled with one Rani Indrawati.

In July 1862, the appellant commenced the suit which has given rise to this appeal, in which he claimed against the respondents, first, the right to resume 9,000 bigas of land held by them upon the tenure which will be afterwards considered ; and, secondly, the right to recover from them 2,000 bigas of land, described as *towfir*, or excess, being lands which, he alleged, they had wrongfully acquired under color of their tenure, by gradual encroachment or otherwise.

The Court of first instance allowed the first of these claims, but rejected the second. On appeal and cross-appeal, the High Court of Calcutta rejected both claims, reversing the decree of the Court below on the first, and affirming it on the second, and dismissed the suit. This appeal again raises both questions.

(1) S. D. A., 1858, 84.
(2) *Id.*, 1857, 786.

(3) S. D. A., 1857, 1772.
(4) *Id.*, 1812.

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The claim of *towfir* may be shortly disposed of. It was very faintly pressed at the bar. Mr. Leith, it is true, relied upon a passage in the Ameen's report, but the principal Sudder Ameen was of opinion that, on the Ameen's report taken as a whole, no excess of land was shown to be in the respondent's possession; but that, on the contrary, they appeared to hold less than 9,000 bigas in all. The High Court has confirmed that decision, and no grounds have been laid before their Lordships, which would justify them in disturbing the concurrent finding of the two Indian Courts on what is, in fact, a mere question of boundary and measurement.

In dealing with the question of resumption, their Lordships desire to state in the first place, the conclusion to which they have come, touching the origin and duration of the tenure on which the lands sought to be resumed are held.

The following is its history:—In 1775 the lands in question were granted by the sanad, to Mir Syad Ali, a Persian, who had done, and was doing, good service in repressing or preventing the incursion of wild elephants coming from the morangs or terai upon the cultivated lands of Pergunna Sultanpur. This first sanad contained no words of inheritance. In 1786 the Mir, being then dead, the Government granted the second sanad in favor of Mir Abdul Hossein Khan and Mir Ali Riza, who represented themselves to be the elder brother and nephew of Mir Syad Ali, and as such, his heirs. This sanad does contain words of inheritance, and made the grantees and their descendants fixed jaghirdars. It is not shown what, if any, interruption of possession took place between the death of Mir Syad Ali and the date of this second sanad. In February 1804, Mirza Mahomed Sadak Gulstana and others brought a suit against Mir Ali Riza and the widow of Mir Abdul Hossein, alleging that they were the true heirs of Mir Syad Ali, and that the grantees under the second sanad had falsely pretended to be his brother and nephew. The first decree in this suit declared the plaintiffs to be the true heirs of Mir Syad Ali, and directed the defendants to relinquish the possession and enjoyment of the jaghir to them, treating, apparently, the former as trustees for the true heirs.

On appeal, the Provincial Court affirmed this decree, and dismissed the appeal. But considering, apparently, that it could not, without the sanction of Government, transfer the benefit of the second sanad from the persons named in it to the true heirs of Mir Syad Ali, it directed that the possession of the former should remain undisturbed, "until an order should be issued from head-quarters," meaning the Governor-General in Council.

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In consequence of these decisions, the third sanad was granted on the 10th of January 1807. It recited the two former sanads; and that by the decrees in the last mentioned suit, the heirship of the plaintiffs had been proved, and the said jaghir continued to the plaintiffs. And it went on to state that, under these circumstances, the Government had, on the application of Mir Mahomed Sadak, confirmed the said jaghir lands to the plaintiffs, from whom the present respondents derive their title.

Under the three sanads, the lands comprised in the jaghir have been held rent-free for nearly a century.

One of the questions raised in the suit is, however, that under the circumstances above stated, the title of the respondents must be held to have been first created by the third sanad in 1807; and that inasmuch as the zemindari, of which Sultanpur was then part, was permanently settled in 1802, the appellant who claims through an auction-purchaser, is entitled, under Act I of 1845, to set aside the tenure as one created within his zemindari since the perpetual settlement.

Their Lordships are of opinion that this contention cannot be supported. It is perfectly clear that the effect of the second sanad, granted in 1786, was to create sixteen years before the settlement of the estate in 1802 an hereditary jaghir tenure; and that the settlement was made upon the assumption of the subsistence of that hereditary jaghir. The grant was perfectly good against the zemindar, who could not have come into Court to set aside the second sanad, on the ground that the grantees had obtained it from Government by fraud or misrepresentation. Nor, in fact, has any Court or any authority ever revoked or set aside that second sanad. The decrees in the suit between the real and pretended heirs of Mir Syad Ali made (subject to the

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sanction of Government) the latter trustees for the former, and directed them to relinquish the enjoyment of the lands accordingly. And the Government by the third sanad sanctioned that arrangement, and confirmed the title of the true heirs. On this view of the transaction, the action of Government, and the inaction of the zemindar in 1807, become intelligible. For it is not to be presumed that the Government would have assumed the power of granting a new tenure in a settled zemindari, or that the zemindar would have submitted to such an invasion of his rights. Their Lordships, therefore, concurring on this point with the High Court of Calcutta, are of opinion that the jaghir of the respondents must be held to be a tenure created before, and, subsisting at the time of, the decennial settlement; and consequently that it is within the exception of the 26th section of Act I of 1845, whether the appellant has or has not in respect of his estate the powers of an auction-purchaser under that Act (as to which their Lordships express no opinion), and whether the lands comprised in it were or were not part of the zemindari settled in 1802.

Has, then, the appellant established his right to resume the lands comprised in this ancient jaghir? His case is that they are within the limits of the zemindari settled in 1802; that as between the Government and the zemindar, they were then treated as māl or revenue-paying lands, and a revenue assessed upon them, although they were then, and have ever since been, held rent-free as between the zemindars and the jaghirdars; that, under these circumstances, they must be deemed to be chakiran or service lands, and that the services on which they were held being no longer required or performed, the right of the zemindar to resume them has accrued.

Some attempt has been made on the part of the respondents to show that the lands comprised in the jaghir are not even within the geographical limits of the settled zemindari, or, at least, have not been proved to be so. But, looking at the pleadings and the evidence, their Lordships are of opinion that, upon this point, the appellant has established his case. He has given strong *primâ facie* proof of the fact, and there is no evidence at all to the contrary.

If this be so, the next question is, how were the lands dealt with on the occasion of the settlement? They were then unquestionably held rent-free, under a subsisting sanad, and the presumption is that they would be treated as lakhiraj. In that case no revenue would be assessed upon them. Nor would the zemindar acquire any right to question the validity of the title on which lakhiraj land of that extent was held. That question could only be raised by Government; and having been decided adversely to Government in 1845, the title of the respondents would now be indefeasible.

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On the other hand, it seems to follow that if, on the occasion of the settlement, revenue was assessed on these particular lands as between the Government and the zemindar, they must, since they produced no money rent payable to the zemindar, have been treated as in the nature of chakiran lands within the meaning of the 41st section of Regulation V. II of 1793, upon the notion that the services to be performed by the tenant were equivalent to rent payable to the zemindar. It is therefore a very material issue whether, in point of fact, these lands were, on the occasion of the settlement, treated as part of the māl assets of the zemindari.

Their Lordships are not prepared to say that the appellant has established the affirmative of this issue beyond reasonable doubt.

He relies mainly on the evidence afforded by the quinquennial register, and the proceedings in the resumption suit brought by Government against the respondents, or those through whom they claim, which was finally determined in 1848.

Their Lordships do not concur with the High Court in thinking that the first of these documents has not been properly authenticated. The learned Judges of that Court seem to have confined their attention to the extract at page 92 of the record, and to have taken no notice of the fuller document at page 122, which not only bears the Collector's seal, but is shown by the indorsements upon it to have been the identical paper produced by the jaghirdars in the resumption suit. The appellant's case is, that the lands in dispute are included in the villages, Talook

1870 Ramgunj, and Mauza Gurka, part of Talook Rimai, on which a revenue of rupees 850 appears to have been assessed.

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Their Lordships cannot assent to the proposition of the learned counsel for the respondents, that Talook Rimai is something different from Pergunna Sultanpur; and that the appellant is bound to show that the lands in question are māl lands within Sultanpur Proper. They think it is proved that Talook Rimai was part of Pergunna Sultanpur in the larger sense of that denomination. Nevertheless, if the appellant's case depended solely on the quinquennial register, their Lordships would doubt whether it had been sufficiently proved that the lands in question were subject to the assessment. For even if it be assumed that the different villages or divisions of land mentioned in the *chak-band* and Ameen's Report are comprehended within the denominations of Talooks Ramgunj and Gurka, it seems consistent with that register that those mauzas may have included the 9,000 rent-free bigas in excess of the 5,819 bigas mentioned in it as the lands in respect of which the revenue of rupees 815 was assessed. But it is argued that the identity of the jaghir lands with the māl lands in Talook Ramgunj &c. has been admitted by the respondents, or those through whom they claim in the resumption suit. The question then arises, what is the weight to be given to that admission?

Their Lordships cannot agree with the learned Judges of the High Court in treating it as a mere admission or argument at the bar by a mookhtear, whose authority to make it is not proved.

It seems to them to be the foundation and substance of at least one of the defences deliberately pleaded by the jaghirdars in the resumption suit to the claim of Government. It was not the sole defence, nor can the ultimate decision of the case be said to proceed upon a finding by the Collector that the lands were māl and not lakhiraj; for he seems to have held that the proof of the sanad was of itself a bar to the claim of Government in that proceeding. Nevertheless, the admission appears to their Lordships to be one of a grave character; and though it is not to be treated as an estoppel, it at least casts upon the respondents the burthen of explaining it, and of showing that what was then deliberately asserted was not the fact. The

onus then of showing that the jaghir lands are something distinct from the mal lands of Talooks Ramgunj and Gurka is shifted upon them. And this fact they have not attempted to establish by direct evidence. They have been content to rest on the alleged insufficiency of the proof on the other side. Their Lordships, therefore, are constrained to say that, though the evidence before them is not conclusive, the preponderance of it is in favor of the allegation that the jaghir lands were made the subject of assessment in the settlement between the zemindar and the Government in 1802.

But is it a necessary consequence of this finding that the appellant is entitled to resume these jaghir lands? His right to do so must depend on the nature of the tenure; and it is worthy of observation that so little value did the zemindar in possession between the years 1835 and 1845 attach to this supposed right of resumption that he did not intervene, as undoubtedly he might have intervened, to resist the then claims of Government.

The settlement between Government and the zemindar cannot affect the rights of the jaghirdars. The lands held on this tenure, even if then treated as in the nature of chakiran lands, differ widely from the ordinary chakiran lands contemplated by section 41 of Regulation VIII of 1793. They seem hardly to fall within the description of "lands held by a public officer or a private servant in lieu of wages." Neither Mir Syad Ali, nor his descendants were by the sanads appointed to an office known as "elephant-hunter for the pergunna," or by any like description. Still less ground is there for saying that they were the private servants of the zemindar. Their right, whatever it be, was derived not from any zemindar, but from the supreme authority in the State.

Their Lordships have carefully considered the various authorities cited at the bar; but they can find none which expressly govern the case.

Of those which have been decided by this committee, it is sufficient to say that, in the Madras case in *Unide Rajaha Raje Rommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (1),

(1) 7 Moore's I. A., 128.

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the question really discussed and decided was, whether the tenure in question was *inam* or *amaram*; it being established and almost admitted that, if it were the latter, it was resumable at pleasure; and the case of *Joykishen Mookerjee v. The Collector of Burdwan*, (1) decided that lands held in lieu of remuneration by a village chowkidar, though unquestionably *chakiran* within the meaning of Regulation VIII of 1798, section 41, were not resumable at the pleasure of the zemindar, if the public, or the Government representing the public, had an interest in the appointment of the chowkidar.

The Indian authorities are not quite consistent with each other; but taken altogether, they do not appear to their Lordships to establish the right for which the appellant contends in this case.

In the case of *Hurrenarian Ghose v. Mussamat Urnoo Dosses* (2), the *chakiran* lands had been assigned for the maintenance of a chowkidar, and the existing chowkidar had no connection with them, being otherwise remunerated. Other provision had, therefore, been made for the service to be rendered in return for them.

In the case of *Maharaja Sreeschunder Ras v. Madhub Mochee* (3), the tenant whose services had been dispensed with, or had otherwise ceased, was clearly the mere private servant of the Maharaja (the zemindar). He was the person bound to perform all the leather work required in the family.

The case of *Tehayet Jugmohun Singh v. Raja Neelanund Sing*, (4) was one of *ghatwali* tenure; and one of the learned Judges who decided it (Mr. Justice Trevor), in the subsequent case decided by him, and Mr. Justice Campbell in *Munrunjun Sing v. Rajah Leelanund Sing* (5), and again in the case decided by the Full Bench in *Baboo Koolodeep Narain Sing v. Mahadeo Sing* (6), concurred in the ruling that all that was laid down in the first-mentioned case, beyond the decision that the zemindar was entitled to resume, when the *ghatwal* had actually failed to render the service which he was bound to render, was mere *obiter dictum*. Both these cases in the Weekly Reporter support the

(1) 10 Moore's I. A., 16

(4) S. D. A., 1857, 1812.

(2) S. D. A. 1857., 786.

(5) 3 W. R., 84.

(3) *Id.*, 1772.

(6) Case No. 290 of 1865; 8th Sept. 1866.

contention of the respondents, rather than that of the appellant. Both also relate to ghatwali tenures. The case decided in 1868, *Mahbub Hossein v. Patasu Kumari* (1), is to the effect that the Government having concurred in the suppression of the office, the son of a ghatwal who had held his office, not by hereditary right, but on the appointment of the zemindar (though practically the son had continually been appointed in succession to the father) could not successfully sue to recover lands which the zemindar had resumed.

Their Lordships do not think it necessary, for the determination of this case, to examine minutely these decisions touching the ghatwali tenures. And they abstain the more willingly from doing so, since it was stated at the bar that some of them are likely to be brought regularly before this Board by appeal. But they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the case of *Baboo Koolodeep Narain Sing v. Mahadeo Sing* (2).

Another case cited is *Bhugoe Rase v. Azim Alee Khan* (3). The property, as in this case, was a jaghir. The decision did no more than remand the case for re-trial, with the following intimation of opinion:—"The issue raised by the plaintiff is not solely whether the grant to the ancestor of the defendant is hereditary, but also whether it has any condition of service annexed to it or not; and if it has, whether that service be still performed; should a condition of service be annexed to the grant; the hereditary nature of the grant will not be the test of its present validity, but the performance of the required service; and if this service be not performed, then, notwithstanding its hereditary nature, the tenure will be liable to resumption."

To this ruling, if it be understood to mean only that, where the continued performance of certain services is upon the true construction of the grant, the condition on which the lands are to be held, their Lordships conceive no exception can be taken. But if it means that, whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed, their Lordships think that the proposition is far too wide.

(1) 1 B. L. R., A. C., 120.

(3) S. D. A., 84.

(2) Case No. 220 of 1865, 8th September 1866.

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The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

They agree with the observation of Mr. Justice Jackson in *Baboo Koolodeep Narain Sing v. Mahadeo Sing* (1), that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office, the performance of whose duties are remunerated by the use of certain lands.

They have already stated that, in their opinion, the grant in question does not fall within the latter category.

Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that the service ceasing, the tenure should determine.

It appears to their Lordships that neither the first nor the second sanad is a grant of the kind last mentioned. Each proceeds in part upon the past services of Mir Syad Ali; nor is the consideration, so far as it is unexecuted, wholly the keeping up of a body of men to repel the incursions of the elephants, for the grantees are also to cultivate the waste land. The latter stipulation was probably designed to protect the already cultivated districts of Sultanpur, by interposing a further belt of cultivation between them and the forest. Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services. Again, neither sanad contains any words which expressly import that the tenure shall cease if, and when any of, the services cease to be performed. Such a provision is something very different from one which merely casts upon the grantee the performance of certain duties so long as they are necessary. The former makes the grant determinable when

(1) Case No. 290 of 1865, 8th September 1866.

there is no further occasion for the services. But, in the latter case, if the operation of any natural cause (as, *e. g.* the progress of cultivation which has caused the wild elephants to cease out of the land) removes the necessity for the services, the grantee will hold the lands practically freed from the condition originally imposed upon him. Their Lordships are therefore of opinion that, upon the true construction of these sanads, the grantees, though bound to protect the pergunna from the incursions of wild elephants so long as those incursions lasted, and though still bound to do so, should by any chance, those incursions be renewed, and though they may be liable to forfeit the tenure if they wilfully fail in the performance of this duty, are not liable to have their lands resumed, because there is no longer any occasion for the performance of this particular service, "there being now no fear of the depredations of elephants in those places."

Had this been a grant reserving to the zemindar a small money rent, as well as the services, if, indeed, the latter are reserved to the zemindar, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making māl lands rent-free in the hands of the jaghirdars, does not affect the construction of the sanad, or the rights of the parties.

It emphatically lay upon the appellant, who is seeking to dispossess, or to rack-rent, the respondents, who by themselves, or their ancestors, have brought these lands into cultivation, and enjoyed them for so long a period, who must have been permitted by former zemindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become mere matter of tradition, to make out a clear title to resumption. In their Lordship's opinion he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right, and ought to be affirmed. They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

Appeal dismissed.

Agents for appellant: Messrs. Chilton, Burton, Yeates, and Hart.

Agent for respondent: Mr F Barrow.

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[APPELATE CIVIL.]

Before Mr. Justice Bayley and Mr Justice Norman.

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**BABOO TUNDAN SING (ONE OF THE DEFENDANTS) v BABOO PUKH-
NABAYAN SING AND OTHERS (PLAINTIFFS).***

*Act I of 1845, s 21—Act XII of 1841, s. 22— Regulation XI of 1822—
Purchaser at a Revenue Sale—Revenue Sale—Benami Purchase—Manager
of a joint Hindu Family.*

A purchase by a managing member of a joint Hindu family, in his own name, at a revenue sale held under Act I of 1845, is not affected by section 21 of the Act—A suit by one of the members, for recovery of possession of his share of the property, purchased by the managing member in his own name, but for the use of the family, is not a suit to oust a certified purchaser, and therefore not affected by section 21, Act I of 1845 (1).

THIS suit was instituted before the District Judge of Patna. The plaintiffs were Pukhnarayan Sing, Kasi Sing, and Tilakdhari Sing.

The defendants were: 1—Thundan Sing; 2—Mattra Sing; 3—Lodi Sing; 4—Mahtun bearer; and 5—Tukan Sing.

The plaintiffs and the 1st, 2nd, 3rd, and 5th defendants were members of a joint Hindu family.

The suit was for recovery of possession, after adjudication upon the rights and interest of the parties respectively in their shares in certain estates and house property in Mauza Mahusa, and for confirmation of possession of certain other estates, in Pergunnas Ghiaspur, Bhimpur, and Pellich, acquired at the time of joint tenancy, from the *ijmali* or joint fund, and the profits of the ancestral property and the ancestral funds. The suit was valued at rupees 1,60,485-1, including rupees 1,09,410-1-10, mesne profits, from 1269 to 1274 (1862 to 1867), as per account and boundaries detailed before. The

* Regular Appeal, No. 39 of 1869, from a decree of the Judge of Patna, dated the 15th September 1868.

(1) But see section 36, Act XI of 1859.

cause of action arose on the 27th Magh 1268 (8th February 1861), the date of separation from common residence.

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Much of the property in respect of which the suit was brought had been purchased by the defendant Tundan Sing, as he alleged, after a separation in the family (which he said took place in 1243 (1836 in his own name and out of his own resources which he had acquired by trading on his own account. The defendant, however, failed to prove the separation set up by him, and it appeared that although he had been allowed to remain for a long time in sole possession of the property which was the subject of suit, he had in fact bought it as managing member for the joint family, and on the family account. Part of the property was bought at sales for arrears of Government revenue under Regulation XI of 1822, before the passing of Act XII of 1841, and part at sales for arrears of Government revenue after the passing of that Act. Tundan Sing's name alone was recorded as that of the certified purchaser, and it was contended on his behalf, with reference to Act XII of 1841, section 22, and Act I of 1845, section 21, that as he alone appeared to be the certified purchaser, the suit against him ought to be dismissed.

The Advocate-General and *Mr. Money* for the appellant.

Mr. Paul for the respondents.

NORMAN, J., after going through the facts of the case, commenting on the evidence generally, and observing:—"No doubt a strong inference in favour of the defendant arises from the acquiescence of the family in the dispossession for so long a time. But I am not prepared to say that such inference ought to prevail against the evidence on which the Judge has based his decision, especially if we regard the practice in native families of leaving almost all matters in the hands of one and only one acknowledged *kurta*, or head of the joint-family," continued—The only remaining question was that argued by the Advocate-General as to the property purchased by Tundan Sing in his own name at sales for arrears of Government revenue.

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Item No. 1, eight annas of Mahura, was purchased prior to the passing of Act XII of 1841, at a sale for arrears of Government revenue under Regulation XI of 1822. It is admitted that the Regulation in question contains no provision which can affect the rights of the plaintiff in the present suit. The 19th and 20th sections of that Regulation empowered the Government in case of a *benami* purchase to annul or cancel the sale, and to dispossess the purchaser.

As to the purchases made after the passing of Act XII of 1841, section 22 of that Act provides "that any suit brought to oust a certified purchaser as aforesaid, on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." Act XII of 1841 was repealed by Act I of 1845, and it has been decided, and we think rightly decided, by Mr. Justice Mitter, in *Booa Russooles v. Nawab Nawim of Bengal* (1), that, by such repeal, the defence which the nominal purchaser would have had in a suit by the real purchaser is taken away.

Then comes a question as to a purchase of six annas of Mahespur made by the defendant Tundan Sing, at a sale for arrears of Government revenue, after the passing of Act I of 1845.

The case of a purchaser at a sale for arrears of Government revenue made by the manager of a joint Hindu family in his own name, on behalf of the joint family, does not appear to be expressly provided for by section 21 of Act I of 1845, and it would only be by a forced construction that such a case could be brought within the terms of that section. The section is a penal one, and should, we think, be construed strictly. The words are:—"Any suit brought to oust the certified purchaser as aforesaid, on the ground that the purchase was

(1) *April 26th, 1869.*—In this case, MITTER, J., relied on *Raja Satya Saran Ghosal v. Mahesh Chandra Mitter*, 2 B.L.R., P. C., 28, q. v., and also on *Gopee Mohan Thakoor v. Raja Radhanath*, 2 Knapp's P. C. Cases, 228, as illustrating the doctrine that "a Statute which does not declare a particular transaction to be il-

"legal, but which is merely restrictive of jurisdiction; or, in other words, which simply prohibits the cognizance of a suit based upon that transaction, can be set up as a bar to such suit, after it has been repealed by a subsequent Act of the Legislature."

“made on behalf of another person, not the certified purchaser,
 “though by agreement the name of the certified purchaser was
 “used, shall be dismissed with costs.”

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I think it must be taken as found as a fact, that the purchase of Maheshpur was made by Tundan Sing, as managing member of the joint family, on behalf of himself and the other members of the family. The suit is not brought against Tundan Sing on the ground that the purchase was made on behalf of another person, and not of himself. The purchase was, in fact, admittedly made by him on his own behalf, though others may be interested with him. The suit is not brought to oust him, but to establish the rights of his co-sharers as joint owners with him. The language of section 36, Act XI of 1859, is different from that of section 21 of Act I of 1845. Words are introduced in the latter enactment, which may probably include the case of a purchaser by the managing member of a joint family in his own name. It stands as follows :—“Any suit brought to
 “oust the certified purchaser as aforesaid, on the ground that
 “the purchase was made on behalf of another person, not the
 “certified purchaser, or on behalf partly of himself, and partly
 “of another person, though by agreement the name of the
 “certified purchaser was used, shall be dismissed with costs.”

On the whole, we are of opinion that a purchaser at a sale for arrears of revenue under Act I of 1845, made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act, and that notwithstanding anything contained therein, the members of such joint family may sue to enforce rights acquired by them under such a purchase, as against the managing member, though he is the sole certified purchaser.

The result is that in our opinion the appeal must be dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice and Mr. Justice Phear.

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June 23.

SRINATH DAS (DEFENDANT) *v* PARK PITTEK AND ANOTHER
(PLAINTIFFS).

*Mutual Dealings—Act XIV of 1859, s. 8.—Limitation—Year—Account,
Balance of.*

The defendant in 1865 and 1866 indented on the plaintiffs for large quantities, of merchandize, which was shipped to Calcutta from time by the plaintiffs agents in London, who drew bills on the defendant for each shipment, forwarding such bills and the shipping documents to the plaintiffs in Calcutta. The bills were presented to the defendant by the plaintiffs and accepted by them. In the course of the transactions, several of the acceptances were dishonoured by the defendant, and the plaintiffs at his request allowed him to renew the bills. Some renewals took place in August and September 1866. In March, May, and July 1866 the defendant made purchases from the plaintiffs and the plaintiffs made purchases from the defendant. The plaintiffs were in the habit of closing their accounts on 30th June in each year. In an action for balance of account brought on 24th February 1870, *held*, that the parties were merchants and traders having mutual dealings under section 8 of Act XIV of 1859. The year mentioned in section 8 of Act XIV of 1859 is intended to be reckoned from the time when the balance of accounts is struck. In this case that was the 30th June 1867; the suit therefore was not barred.

Quære.—What would be the operation of the section in those cases in which the merchant or trader balances his accounts at the lapse of a period of less than one year?

THIS was an appeal from the decision of Mr. Justice Norman. The suit was brought to recover the sum of rupees 3,772-13-6, on the balance of an account current between the plaintiffs and defendant in respect of alleged mutual dealings between them, for the price of goods sold and delivered by the plaintiffs to the defendant at his request, and for money paid by the plaintiffs to the use of the defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them between the 22nd February 1866 and 25th May 1867. There was also a claim for interest on the above-mentioned balance from the 1st July 1867 to the date of the filing of the plaint. The plaint was filed on the 24th February 1870. The plaintiff alleged in his plaint that the use of action in

respect of the said balances arose on the 30th June 1867. The plaintiffs were described as the members of the firm of Charles Nephew & Co. carrying on business in Calcutta, and the defendant as a merchant and trader also carrying on business in Calcutta.

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From the written statement of the plaintiffs, it appeared that in 1865 and 1866 the defendant indented on the plaintiffs for large quantities of merchandize which the plaintiffs were to obtain on the defendant's account and risk from England; the defendant authorizing the agents of the plaintiffs to draw bills on him for the amount of the invoice of the goods, the defendant engaging to accept such bills on presentation and pay them at maturity; that the goods so indented for were from time to time shipped by the plaintiffs' agent in London, Messrs. Parke, Pittar & Co. who forwarded the shipping documents to the plaintiffs through a bank to whom the goods were pledged, and drew, on the defendant for the amount of the consignment, such drafts being forwarded to the plaintiffs and presented by them to the defendant for acceptance; and on payment of his acceptances the shipping documents relating to the goods against which such drafts had been drawn were made over by the plaintiffs to the defendant who obtained delivery of the goods; that on the 22nd February 1867 the defendant being unable to honour one of his acceptances in respect of certain goods, requested time for payment, which the plaintiffs allowed him on his accepting three drafts for rupees 417-1-9, being the amount of the dishonoured acceptance with interest, which the defendant did, and was credited with the amount of the renewed draft on the plaintiffs' account; that subsequently various other acceptances were dishonoured by the defendant which the plaintiffs allowed him to renew in the same way, crediting him with the amount of each renewed acceptance and debiting him with the amount of the dishonoured acceptances, the plaintiffs holding the shipping documents as security for the payment of the renewed acceptances; that the defendants, from time to time, made payments on account to the plaintiffs, they handing over shipping documents for goods of an equivalent value; that the defendant from time to time purchased various goods from the plaintiffs, and the plaintiffs

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PARK PITTAR. also from time to time purchased goods from the defendant, the following being the dates of such mutual purchases, viz., March 3rd and 28th, May 31st. and July 13th and 18th, 1866; that the defendant at the end of 1866 went to reside at Chandernagore, and remained concealed there till the middle of 1869, during which time the plaintiffs made several ineffectual attempts to discover his residence for the purpose of taking proceedings in respect of their claim against him.

The defendant, in his written statement, submitted that the claim was barred by limitation; that he had been indebted to the plaintiffs in the sum of rupees 311-8-9 or thereabouts, being the balance due by him to the plaintiff for money lent and advanced during 1866, but such debt was barred by limitation that sometime in 1866 he indented for certain goods through the plaintiffs, and failed to honor some of the bills drawn against certain shipments on which the plaintiffs sold the goods on the defendant's account, but the defendant had never received from them any account of the sale of the said goods.

NORMAN, J.—The question in this case turns on the construction of section 8. Act XIV of 1859. That section enacts that “in suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings, such year to be reckoned as the same is reckoned in the accounts.” The first and important question is are the accounts between the plaintiffs and the defendant “accounts current between merchants and traders who have had mutual dealings.” The words have been considered in *Ghaseeram v. Monohur Doss* (1), an appeal from this Court in its Original Jurisdiction, and a liberal construction put on the words. The defendant is a general merchant dealing in brandy, precious stones, and other merchandize. He employs the plaintiffs as his agents to get

(1) 2 Ind. Jur., N. S., 241.

goods from London on indent, and he purchases also from them goods supplied in Calcutta in the ordinary course of business. The plaintiffs, Messrs. Charles Nephew and Co., render themselves responsible to the parties executing the indents. The plaintiffs have been in the habit of taking up the bills drawn against the goods shipped in the indents, drawing on the defendant, Srinath Doss, and from time to time renewing the bills as they fell in. The three bills put in are renewals dated August and September 1866. It appears that the plaintiffs have, in execution of orders received by them, required small quantities of the brandies consigned under the indents. They have, as merchants, and not for mere private or domestic purposes ordered three cases in one instance and one case in another of the defendant who has supplied them as a merchant. The question is whether there is a mutual dealing between the parties. The plaintiffs having acted as the defendant's agent, I find, as a fact, that the plaintiffs and the defendant are merchants and dealers who have had mutual dealings. The next question is what was the year in the accounts of which there is the last item admitted or proved, indicating the continuance of mutual dealings. It appears to me the acceptances by the defendant of the bills received in August and September 1866 were acts which indicated the continuance of the mutual dealings, showing that the parties were dealing in the same way as they had previously done up to that time. The next question is what is to be considered the close of the year of the dealings that then took place. Section 8 of Act XIV of 1859 provides that "such year is to be reckoned as the same is reckoned in the accounts." I can only conclude that the year is not necessarily to be the English year or the Bengali, Sumbut, Mahajani, or Fasil year, but may be something different. It is to be the year as reckoned in the accounts. If the accounts are made to the particular date on which the books are closed, I think the parties are allowed three years from the end of such conventional year. In the present case the plaintiffs' books are regularly made up year by year to the 30th June. The suit, therefore, having been brought within three years from the 30th June 1867, appears to me to be within time.

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From this decision the defendant appealed on the following grounds:

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1. That the learned Judge ought to have held that under clause 9, section 1 of Act XIV of 1859 the claim of the plaintiffs was barred, and ought therefore to have dismissed the case.

2. That the learned Judge was in error in holding the plaintiffs' claim was of the nature of mutual dealings between merchants and traders, when he ought to have held that there was no evidence of mutual dealings between the plaintiffs and the defendant within the meaning of section 8 of Act XIV of 1859.

3. That the learned Judge was in error in allowing the plaintiffs to reckon their year from the 30th June, when being European merchants their year ought to have been held to run from the 1st January to the 31st of December.

Mr. Branson for the appellant.—The transactions between these parties were not mutual dealings—*Phool Coomaree Beebe. v. Oonkur Pershad Roostobi* (1), *Ghaseeram v. Monohur Doss* (2) In the latter case the test was held to be whether the dealings were such that the balance was sometimes in favour of one party and sometimes of the other. Accounts made up to any day are not sufficient for the purposes of Act XIV of 1859, section 8; for in that case accounts would be made up merely for the purpose of bringing actions. For the purposes of section 8, the year must be taken to be that beginning on the 1st January, and closing on the 31st December.

The *Advocate-General* (offg.) for the respondents, contended that the parties were traders, and that the transactions between them were mutual dealings. Section 8 of Act XIV of 1859 clearly applies, and there is no reason for saying that, in the case of European merchants, the year is to be that closing on the 31st of December.

Mr *Evans* on the same side.—The object of the section is that the party is not to be considered in a position to sue until the end of his year's account. Therefore his year must be taken to be

(1) Ind. Jur N. S. 40

(2) 2 Ind. Jur. N. S. 241.

the one meant. The year taken in the account which has been proved must be the year meant.

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Mr. Branson in reply.

COUCH C. J.—I think that the judgment of Mr. Justice Norman must be confirmed. There is no question here that both parties are traders. Here they had mutual dealings. Now section 8, Act XIV of 1859 (1), says nothing of the extent of the mutual dealings. In this case there were two dealings. One was a purchase by the plaintiff from defendant of two cases of brandy, and the other the purchase of one case. These constituted a case of mutual dealings. I don't see if we went into a consideration of the extent of mutual dealings, that there is any thing at all to guide us in the case of mutual dealings. The only question is whether Mr. Justice Norman was right with regard to the mode in which he reckoned the year. The Legislature would seem to have contemplated that the accounts would be yearly accounts, and that the balance would be struck yearly; and I think when we look at the reason of that provision, it must mean that the year was intended to reckon from the time when the balance was struck. The object seems to me to be this, that if there were accounts between the parties, in many cases there would be no right to sue at all until a balance is struck,—and in other cases, even if there were a right to sue, the merchant would not sue without a balance being struck. It was intended that the year should reckon from the period when he might be expected to sue on the balance, and he is to have three years from that time as in ordinary cases. Mr. Branson has argued that this construction would enable parties to bring false actions by making up books. It may be that fraud would be practised in some cases, but we must not put a forced construction on an Act for the purpose of preventing fraud. Fraud is prevented in other

(1) Act XIV of 1859, sec. 8.—“In suits for balances of account current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings, such year to be reckoned as the same is reckoned in the accounts.”

1870 ways, and by the criminal law. This observation was made in
 SRINATH DAS a recent case before the House of Lords, where it was argued
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 PARK PITTAR. against the law with regard to the endorsement of one of a set
 of bills of lading passing property that it would open a door
 to fraud, and Lord Westbury replied that fraud was prevented
 by other means, and not by putting a construction on a law with
 the view to prevent fraud. That is an answer to Mr. Branson's
 argument that parties would fabricate books to avoid the operation
 of the limitation law. If a party is able to do that, he
 would possibly find some easier method than making up books
 for a long series of years.

The decree of the learned Judge will be affirmed with costs.

PHEAS, J.—I quite concur. There can, I think, be no doubt
 in this case that the parties are traders, and that there have been
 mutual dealings between them as traders. However, during the
 consideration of the case, I felt that there was some difficulty in
 arriving at a conclusion. I have no doubt that the Chief Justice
 is correct in the supposition that the framers of the Act when
 wording this section had present to their minds only the case of
 yearly accounts. But even if that be so, it does not necessarily
 follow that the year to which they refer in this section is the
 period of twelve months at the lapse of which the accounts are
 made up. But probably the reason which actuated the Legislature
 in giving this particular period of limitation is that which was
 pointed out by Mr. Evans, namely, that it is reasonable not to
 force a merchant to sue until the period has elapsed at which he
 usually makes up his accounts with his constituents; and if that
 be the proper guide for the construction of this section, then
 I think we must take it that the year which is here mentioned is
 the twelve months which the merchant takes customarily for the
 currency of his accounts before balancing them. It appeared
 to me at first that the last words of the section which define,
 so far as the Legislature has defined, the year which was con-
 templated, namely, "such year to be reckoned as the same is
 reckoned in the accounts," meant the year of the style in which
 the accounts were kept: they seemed to me to bear that meaning
 more readily than any other, and that meaning would certainly

make the section more completely operative than the one which I have already said I believe that the Legislature did really intend them to carry. I say more completely operative, because there is a class of cases, more or less large, and which will certainly not be easily brought within the scope of this section within the meaning of the word "year" which we feel obliged to give to it, that is, all those cases in which the merchant or trader balances his accounts at the lapse of periods which are less than twelve months. We have in this account examples of such cases, but it is rather difficult to foresee what would be the result of applying this section to one of them.

Appeal dismissed.

Attorney for the appellants : Baboo J. C. Chowdhry.

Attorneys for the respondents : Messrs. Berners & Co.

Before Mr. Justice Norman

IN THE MATTER OF KHATIJA BIBI.

Habeas Corpus—Return, Contradiction of—Mahomedan Law—Marriage—Custody of Wife—Minor.

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May 25.

The return to a writ of *habeas corpus* is not necessarily conclusive, and does not preclude enquiry into the truth of the matters alleged therein, although 56 George III., c. 100, does not apply to this country (1).

See also
13 B.L.R. 161,
I. L. R.
1 Cal. 78.

By Mahomedan law the mother is entitled to the custody of a female child, although married, until she has attained puberty.

Where a husband applied that his wife, stated in the return to a writ of *habeas corpus* to be "an infant under the age of sixteen years, to wit, of the age of eleven years or thereabouts," might be delivered over into his custody; the Court, on the ground that she had not attained the age of puberty, and that her dower had not been paid, refused to order her to be taken from the custody of the mother, although the mother had taken her away secretly, in the absence of her father and husband from Bandari, where they were all living together, to Calcutta.

An application was made for a writ of *habeas corpus* to bring up the body of a Mahomedan girl, Khatija Bibi, who was alleged by her husband, Jewa Sallay, on whose behalf the application was

(1) See *Queen v. Vaughan*; in the matter of *S. M. Ganesh Sundari Debi*, ante, p. 418.

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made, to be unlawfully detained in the custody of her mother, Assa Bibi. The application was made on the joint and several affidavit of Jewa Sallay, Amerji Ibrahimji Ismael Kadir Hidad, and Hadji Abu Bucker, in which it was stated that Jewa Sallay was married, on the 20th February 1870, to Khatija Bibi, the daughter of Ismael Assanji and Assa Bibi his wife, at Bundari, according to Mahomedan law and usage ; that Jewa Sallay was, at the time of his marriage, informed by the father that Khatija Bibi was of the age of twelve years and six months ; that after the marriage Jewa Sallay and his wife lived with Assa Bibi and her husband at Bundari ; that two days after the marriage Ismael Assanji left Bundari and went to Calcutta ; that about a week after Ismael Assanji left, Jewa Sallay also left Bundari and went to Bullesari, a place about fourteen miles from Bundari, to attend the wedding of a relative ; that on his return he found the house in which he had left his wife and Assa Bibi deserted ; that about twelve or fourteen days after his return to Bundari Jewa Sallay received information from his father-in-law that Assa Bibi and Khatija Bibi had come to Calcutta ; that Jewa Sallay thereupon went to Calcutta and got information from Ismael Assanji that Assa Bibi and Khatija Bibi were living in the house of a woman named Jhabban Maglani ; that Jewa Sallay thereupon went to her house and saw there Assa Bibi, but she would give him, on being asked, no information respecting Khatija Bibi ; that Jewa Sallay was informed by Ismael Assanji that Khatija Bibi had been secreted by Assa Bibi and placed in the house of one Mowla Bax, a person wholly unconnected with either Jewa Sallay's family or with his wife's ; that Amerji Ibrahimji, and Ismael Kedar Hidad were present at the marriage of Jewa Sallay and Khatija Bibi ; that Hadji Abu Bucker was acquainted with Khatija Bibi who was about thirteen years of age ; that he saw Khatija Bibi seated near the window of the house of Mowla Bax ; that on being informed of this Jewa Sallay went to the house of Mowla Bax to see and bring away his wife, but he was not allowed to have access to the house, and came away without seeing her.

A rule *nisi* was thereupon granted by Mr. Justice Norman, on 9th May 1870, calling on Assa Bibi and Mowla Bax to show

cause why a writ of *habeas corpus* should not issue to bring before the Court the body of Khatija Bibi.

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The affidavit of Assa Bibi put in on showing cause stated, that about eleven months ago her husband induced her to leave Calcutta and go to Bundari on the express understanding that she was to return with him after four months ; that she went to Bundari with her two children, Khatija Bibi and Russul Bibi ; that while she was at Bundari her husband, against her will and consent, procured the marriage of her two daughters, who were both minors, not having attained puberty ; the age of Khatija Bibi being about eleven years, and that of Russul Bibi being four years ; that Jewa Sallay, the husband of Khatia Bibi, well knowing that his wife had not reached puberty left her in Assa Bibi's custody as her mother, and had no intercourse with her and did not consummate his marriage ; that Jewa Sallay had not alleged that his wife had attained puberty, or that the marriage had been consummated, nor, although Ismael Assanji was competent to state the age of Khatija Bibi, had he done so ; that on the marriage of her two daughters, Ismael Assanji took from Assa Bibi her jewellery, and left her at Bundari ; that after her husband had left Bundari she heard he had contracted a second marriage, and was living with his wife in Calcutta ; that thereupon she went to Calcutta with Khatija Bibi, and, finding her husband's house shut against her, she went with Khatija Bibi to the house of the wife of Mowla Bax, which house Khatija Bibi had left about the 28th or 29th of April 1870 ; that Jewa Sallay had instituted a charge against her for detaining his wife for the purposes of prostitution, which charge was false and malicious and made at the instigation of her husband, Ismael Assanji, to get her to leave Calcutta, which she would have to do if Khatija Bibi went to Bundari with her husband, Jewa Sallay ; that it was understood at the time of the marriage that Khatija Bibi should remain in Assa Bibi's custody until she attained puberty ; that she had not yet attained, but puberty, on her attaining puberty she was willing to hand her over to her husband.

Mr *Evans*, in showing cause against the rule, contended that this was not a proper case for a writ of *habeas corpus* to issue

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the question being merely who was the proper guardian for the girl. The age of minority is up to sixteen or puberty, and until then the custody is in the mother. Neither consummation of the marriage nor puberty is shown by the affidavit in support of the rule, nor is it alleged that she is kept from her husband against her will. The custody of a girl is in the mother until puberty, even though she is married—Hedaya Book IV. Chapter XIV. page 388 ; Baillie's Mahomedan Law, page 434. The husband is by Mahomedan law not liable for his wife until she has arrived at a marriageable condition.—Hedaya, Book IV. Chapter XV. page 394. A husband can maintain a suit for recovery of his wife, and this would be his proper remedy here—Baillie's Digest, page 54.

Mr. Mendes was heard for Mowlah Baksh.

Mr. Hyde, in support of the rule, contended that the proper course had been taken by asking for a writ of *habeas corpus*. The husband is the legal guardian of his wife. He was lawfully married to her and lived with her for nine days, from which consummation must be presumed. The Penal Code makes ten years the limit under which a man cannot have connexion with his wife ; before that age consent is immaterial. This girl is above the age of ten. The proper course is to order her to be delivered over to her husband—Macnaghten's Mahomedan Law, page 575.

The rule was made absolute, and a writ of *habeas corpus* issued.

The return to the writ stated :—

That Khatija Bibi was a Mahomedan infant under the age of sixteen years, that is, of the age of about eleven years ; that she had not attained puberty, and was not fit for sexual intercourse ; that Jewa Sallay, her husband, had not paid or tendered any sum as dower ; and that Khatija Bibi was residing with Assa Bibi, her mother and natural guardian, and was unwilling to return to her husband.

In obedience to the writ, Khatija Bibi was brought into Court, and application was then made that she might be delivered into the custody of her husband.

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Mr. Woodroffe for Jewa Sallay.—The return is no answer to an application by a husband for restoration of his wife. By Mahomedan law the husband has dominion over his wife : see *Moonshee Buzloor Ruheem v. Shumssoonissa Begum* (1) Macnaghten's Mahomedan Law, page 215. There seems to be some difference of opinion as to the age at which a marriage may be consummated, some saying the arrival of the girl at puberty, others when she has attained the age of nine—Baillie's Mahomedan Law, page 54. The girl here is eleven years of age, but the question is immaterial here, for we contend that the husband is entitled to the custody of his wife in any case, and he need not allege any particular reason for wishing her to return to him. As to the proper custodian being the mother, it appears to be so by Hedaya, Book IV., Chapter XIV., page 388 ; but here the husband has by his own act substituted a guardian, viz., the mother. This passage of the Hedaya, too, refers only to contentions between the husband and wife as to the custody of the child: see *In the matter of Tayheb Ally* (2). There are three conditions of marriage in Mahomedan law : discretion, puberty, and freedom of will. A wife may be made over to her husband before she arrives at puberty ; but it is one of the essentials to the validity of a marriage that she should have arrived at puberty. This case must be decided by Mahomedan law, and by that law, if the Court is in doubt, evidence must be gone into as to whether the girl has arrived at puberty or not.—Baillie's Mahomedan Law, page 54. [NORMAN, J., refers to *In re Oarus Wilson* (3) as to contraverting the return]. The allegation in the return that no dower has been paid is irrelevant, as no agreement to pay dower is shown, and it is not essential to the validity of the marriage—Hedaya, Book II., Chapter III., page 122. Dower, may be prompt or deferred, but it is not stated which it was to be in this case.

It is alleged that the girl is unwilling to return to her husband, but this also should be matter of evidence. The tests of consent by Mahomedan law are various, and opportunity for putting these tests to the proof should be given—Baillie's

(1) 11 Moore's I. A., 551.

(3) 7 Q. B., 1008.

(2) 2 Hyde, 63.

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Mahomedan Law, pages 55-60. The simple question is whether the husband is entitled to have possession of his wife. The effect of the passage in Macnaghten's Mahomedan Law, page 215, is to place her under the dominion of her husband; and there is nothing in the return to show that she was justified in leaving him, or there would be anything dangerous or injurious to her caused by her residence with him.

Mr. *Hyde*, on the same side.—In England, a girl was by law capable of contracting a marriage at twelve years old, and after the marriage the husband has full dominion over his wife—Blackstone's Commentaries, Vol. 2, page 256. The guardianship of the mother by Mahomedan law only exists for the purposes of education and marriage. The husband may exercise dominion over his wife though no consummation of the marriage has taken place—Hedaya, Book II., Chapter III., page 124. The custody of a girl cannot be in the mother after marriage; it is either in the father or the husband; and the father has given her in marriage, so that the husband is the proper guardian—Macnaghten's Mahomedan Law, page 217, paragraph 18. In a somewhat similar case to this, Wells, J., allowed the husband and wife to have a private interview in which they came to a voluntary agreement to cohabit. The return need not be taken as absolutely true. Evidence may be taken to ascertain the truth—*In re Oarus Wilson* (1). The case here is different, for there have already been affidavits before the Court contradictory to the return.

Mr. *Kennedy*, for Assa Bibi.—The question here is as to the validity of a return to a writ of *habeas corpus*. Such a writ is unknown to Mahomedan law, which cannot therefore govern this return. By English law a return to a writ of *habeas corpus* may be met by confession and avoidance, but cannot be controverted—Bacon's Abr., Title, *Habeas Corpus*, page 135. In this case the questions are as to who is the legal guardian of the girl, and whether she has arrived at the age of puberty. The

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writ of *habeas corpus* is given exclusively to vindicate the personal liberty of the subject and not in order that the individual rights of private individuals to the custody of any person may be tried. By English law the detention of the wife, without the consent of the husband, is detention against her own will, she being presumed to be under his control. Thus in such a case the writ might be applicable. But by the Mahomedan law the right of the husband and wife are perfectly distinct in every relation of life. The mother is the proper guardian of her female children until they arrive at puberty—*In the matter of Tayheb Ally* (1) Hedaya, Book IV., Chapter XIV, page 385. It was contended that the passage in the Hedaya, Book IV, Chapter XIV., page 388, refers to cases only where the dispute is between the husband and wife for the custody of a child, but this is not so. The earliest age at which consummation is legal is fixed by the Penal Code, section 365, to be ten years—a wife being under that age her husband would commit rape by consummating his marriage. A wife is not entitled to maintenance from her husband if she is too young to be capable of generation.—Baillie's Mahomedan Law, page 437; Hedaya, Book IV., Chapter XV., page 394; unless she is incapable through sickness. Her mother is her proper guardian—Baillie's Mahomedan Law, page 434. The husband must pay the dower before he can claim his wife, and in cases where the dower is not fixed, the wife is entitled to her proper dower—Baillie's Mahomedan Law, page 124-125. If the wife is not of years of discretion, the custody of her is in the mother; if she is at years of discretion, the remedy for a Mahomedan husband wishing to obtain possession of her is not by *habeas corpus*. The Mahomedan law in every state of life recognizes a distinction between the rights of the husband and wife: see the case of *Moonshee Buzloor Ruheem. v. Shumssoonissa Begum* (2).

Mr. *Evans* on the same side.—A writ of *habeas corpus* is a proceeding simply intended to vindicate personal liberty not only in criminal cases but in some at common law: see the case of the *Hottentot Venus* (3). When a person is brought up

(1) 2 Hyde, 63.

(2) 11 Moore's L. A., 551.

(3) 13 East., 195.

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under a writ of *habeas corpus* the question of guardianship often arises its being found that he is in confinement against his will.—Bacon's Abr., title, *Habeas Corpus*, page 139. For where he is an infant, the law looks for those who should exercise discretion for him, and delivers him over to them. At common law the truth of a return could not be controverted—Bacon's Abr., title *Habeas Corpus*, page 140. This was before the passing of the 56 George III, c. 100, which gave the power of going behind the return by affidavits in all except criminal cases; but that Statute has not been extended to this country. In criminal cases the law in England still remains that the return cannot be controverted—Broom's Constitutional Law page 223. The remedy in those cases is by civil action for false return—*Id.* 189. The return must, therefore, in this case be taken as true. By the English law the husband and wife have but one will, *vis.*, that of the husband, so the writ of *habeas corpus* became applicable on this principle between husband and wife—Bacon's Abr., Title *Baron and Feme*, C. and G., pages 694 and 710. But the state of husband and wife by Mahomedan law is different; they are two independent persons; there is no reason therefore why the procedure of a writ of *habeas corpus* should be applicable. In the case of *Moonshee Buzloor Ruheem v. Shumsounissa Begum* (1) it was merely sought to enforce a contract. In this case the girl is an infant, and the return is based on the ground that the custody is in the mother until puberty. The question then arises whether this right of the mother has been divested by marriage. The girl is alleged to have not arrived at puberty, and, as her husband is not bound to maintain her until she has arrived at puberty, the custody is still in the mother. If there is no dower fixed, proper dower must be given; it is contended that in such a case it may be deferred; but where it is not fixed, it must be prompt, and not deferred.—Macnaghten's Mahomedan Law, page 281, case 31. When dower is paid, the husband cannot force his wife to come to his house. It is said that dower is not absolutely essential to validity of marriage—Hedaya, Book II., Chapter III., page 122—but where the dower is not fixed, proper dower can be claimed by the wife, even if

(1) 11 Moore's I. A., 551.

the husband die, provided he has consummated the marriage—1870
 Morley's Digest, Title Husband and Wife, section 4, cases IN THE
 42 and 72. Non-payment of dower is a bar to enforcing cohabitation, or if it is enforced the wife's former guardian may take MATTER OF
 her back until payment is made—Baillie's Mahomedan Law, KHATIJA BIBI.
 page 125. The husband in this case agreed that his wife should
 remain with her mother until puberty, and she his unwilling to
 return to her husband.

Mr Woodroffe, in reply.—The argument on the other side is in effect this : that a return not made on oath and for which the parties could not be indicted for perjury is to be taken as conclusive in a matter of this kind, see *In re Carus Wilson* (1) per Patterson, J. The principles on which this case is to be tried are laid down in 21 George III, c. 70, section 8, that is, by Mahomedan law and not by English law. The difficulty of construing the Hedaya is in some degree overcome by seeing what position the passage to be construed holds with regard to the context: see Book I, Chapter VIII, page 62. The passage already referred to. "It, i. e., Nika arises when "the wife gives herself into custody of her husband, and the "maintenance is a recompense for matrimonial restraint"—Hedaya, Book IV, Chapter XV, page 392, means that, although the wife is bound to be in his custody, yet he need not maintain her because she has another recompense, i. e., her dower. [NORMAN, J.—How would dower become payable then?]. By express agreement between the parties—*Abdul Karim v. Mussamat Fazilat-un-nissa* (2). Where there is an express stipulation for dower the case is different from that where there is nothing said about it—Baillie's Mahomedan Law, page 434. It is irrelevant to say that dower has not been paid, for it is also said the marriage has not been consummated, therefore the dower has not become due. The passage cited from Baillie's Digest, page 125, is not of any good authority, and if strictly adhered to would cause much mischief; for in *Mulkah Do Alum Nowab Tajdar Bohoo v Mirza Jehan Kudr* (3), the Privy Council decided that

(1) 7 Q B., 1008.

(3) 10 Moore's I A., 252.

(2) 5 Sel. Rep., 75.

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a very large dower should be divided between the widow, the husband's heirs giving the widow an adequate amount for dower.

NORMAN, J.—(After stating the facts, continued) Mr Kennedy and Mr. Evans contended that the return must be taken as conclusive as to the facts therein stated. I certainly feel great hesitation in assenting to that proposition. The question is one which has been much debated, and in England doubts on the subject have been set at rest in cases like the present by a Statute, 56 George III, c 100, which does not apply to this country.

When the return sets out an adjudication by a Court of competent authority it is well settled that parties will not be allowed to controvert facts directly decided by such authority. That is the ground taken *In the matter of Clarke* (1). But the judgments of Lord Denman, C. J. and Patteson, Williams, and Wightman, J J., in *In re Carus Wilson* (2), to say nothing of other cases, appear to me to show that in other respects the return does not preclude enquiry in to the truth of matters alleged therein. I should hesitate long before pronouncing that I could be precluded by anything in the return in this case from seeing Khatija Bibi with my own eyes, if I thought, it necessary, causing such an enquiry to be made as to her age and condition as would enable me to determine whether or not Khatija is now legally in the custody of Assa Bibi. An enquiry of a character similar to that which was directed by the Court of King's Bench in the case of the *Hottentot Venus* (3), a native of South Africa brought from thence and exhibited in London, as it was supposed against her own consent, or such an enquiry as that by which Mr. Justice Phear satisfied himself that there was no reason to doubt the truth of the return in the *Queen v. Vaughan*. *In the matter of Ganus Sundari Debi* (4).

But Jewa Sallay has not attempted to deny the material statements in the return. He has not stated either in the affidavit on which the rule *nisi* was granted, or elsewhere that Khatija has attained, or that he believes that she has attained.

(1) 2 Q. B., 419.

(3) 13 East, 195.

(2) 7 Q. B., 1008-1112.

(4) 5 B L R O Cr. 418.

the age of puberty, and therefore I must take the statement in the return to that effect as true.

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I proceed to consider what is the position of the respective parties:

According to Mahomedan law the effect of the contract of marriage is to place the wife under the dominion of the husband; but, notwithstanding marriage, the right to the care and custody of a girl belongs not to the husband but to her mother until she attains the age of puberty. In fact, it is said, that when a wife is too young for matrimonial intercourse, she has no right of maintenance from her husband whether she be living in his house or not.

In the affidavit, as well as in the return, Asa Bibi states that the marriage has not been consummated, and that Khatija Bibi was not of the age of puberty at the time of the marriage. Jewa Sallay in his affidavit states that Ismael Assanji informed him that Khatija at the time of the marriage was of the age of twelve years and six months or thereabouts. And Abou Baeker states her age to be now thirteen. Nothing can be more unsatisfactory than the statement in the return as to the age of Khatija Bibi—that “she is an infant under the age of sixteen years, to wit, of the age of eleven years or thereabouts.” Asa Bibi, the mother, must well know the true age of her daughter. This statement as to the age of Khatija in the return would, if the meaning of the words “to wit,” “videlicet,” was explained by the interpreter, be probably understood by Asa Bibi as binding her to nothing.

If the statement said to have been made by the father to Jewa Sallay is true, even if Khatija had not attained puberty at the time of her marriage, she would in all probability do so in a very few months. I rely on the opinion of Dr. Chevers in his Medical Jurisprudence for Bengal and the North-Western Provinces. If the girl has arrived at the age of puberty, the mother is no longer entitled to the custody of her.

It is clear that Jewa Sallay thinks he has grounds for being dissatisfied that Khatija should remain in the custody of her mother. It appears from the mother's own affidavit that he has charged her with carrying off Khatija for the purpose of

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giving her up to prostitution. He does not renew that charge in the affidavit sworn in this matter. Assa Bibi says that this charge was false and malicious. It may be false, but it is easy to understand that Jewa Sallay might very readily impute evil intentions to Assa Bibi. That Assa Bibi should have carried off his wife from Bundari to Calcutta secretly, without giving him an opportunity of claiming possession of her, would seem to have been a clear breach of good faith towards him and of the trust, on which, according to Assa Bibi's own statement, he had allowed his wife to remain with her. In Baillie's Mahomedan Law, page 125, it is said, "A man having contracted his virgin but adult daughter in marriage is desirous of removing with her and his family to another town; he may do so even though objected to by the husband when the dower has not been paid; but if the dower has been paid, she cannot be removed without her husband's consent." The effect of this is that if the time has come when the husband is entitled to possession of his wife, she cannot without his consent be removed by her parents to a distant place.

Here, however, it appears by the return that the wife is not an adult, and that the dower has not been paid,

According to the statement of Assa Bibi in her affidavit she has always resided at Calcutta, and I think I may assume in the absence of anything to lead to a contrary inference that she was or may have been married there.

If so, it is probably the case that had she gone from Bundari openly, she should have had a right to take her daughter to Calcutta and keep her there until she attained the age at which her husband could claim her. In Baillie's Mahomedan Law, page 435, there is some discussion as to the place of "hizanut" where young children may be kept. Jewa Sallay has not attempted to raise the question whether Assa Bibi has a right to the custody of Khatija in Calcutta, by confessing the facts set out in the return and seeking to avoid the effects of them by stating circumstances to shew that Calcutta is not a place to which Assa Bibi had a right to remove her daughter. He does not allege that Calcutta was not the home or place of residence of Ismael Assanji or Assa Bibi at the time of the marriage.

Mr. Woodroffe referred to a passage in Baillie's Mahomedan

Law, page 54, where it is said, "When a husband has paid down the dower and calls upon a Judge to order his wife to be delivered up to him, and her father declares that she is too young, and unfit for a man and unable to bear his embraces, while the husband maintains that she is quite fit and able, then, if she is a person who usually goes abroad, the Judge is to compel her appearance before him, and to determine for himself as to her competency; but if not, he should direct a woman in whom he can confide to inspect her and should order her to be delivered, or not to be delivered to her husband according as they may report her to be competent or incompetent." He contended that Khatija being now before the Court, the Court might direct an enquiry and order Khatija to be delivered to her husband if she should appear to have attained the age of puberty. But it appears to me, that if the husband seeks to have his wife delivered over to him, he has a remedy by a suit for that purpose. The only question upon the return to the writ of *habeas corpus* is whether the custody is legal.

I am of opinion that on the materials before me, I must assume that Khatija Bibi has not attained the age of puberty; secondly, that the dower has not been paid or tendered; thirdly, that there is nothing to shew that Calcutta is not a place in which her mother is entitled to keep her until the time shall come when her husband will have a right to demand to have her delivered up to him. The conclusion is that she must be taken to be legally and properly in the custody of her mother, and I therefore order that she be taken back to the place from whence she has been brought.

Application refused.

Attorney for Jewa Sallay: Mr. Carapiet.

Attorney for Assa Bibi: Mr. Fink.

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[PRIVY COUNCIL.*]

NAWAB MAHOMED AMEENOODEEN KHAN (DEPEND-
ANT) v. MOOZUFFUR HOSSEIN KHAN (PLAINTIFF.)

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June 28.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE, NORTH
WESTERN PROVINCES, AGRA.

*Practice—Act VIII of 1859, s. 2—Waiving objection in Court below; effect of
on Appeal—Form of decree against widow in possession of estate as security
for dower.*

Where a party has a good objection, such as an absence of tender before suit, to
urge to the prosecution of a suit, his omission to do so in the first instance is
fatal to his availing himself of it as an objection on appeal.

Where a woman is in possession of her husband's estate as security for unpaid
dower, the proper decree, in a suit against her for possession by the heir, is a de-
cree for possession, subject to the amount due, with a direction for an account as
to moneys received by her.

A Mahomedan died, leaving among others, a widow and a sister entitled to shares
in his estate. The widow got possession of the whole. The sister died; and after
her death, her husband, on behalf of himself and grandson, sued the widow to obtain
the shares to which the deceased's sister was entitled, and obtained a decree for
payment of the same after satisfaction of the widow's lien for dower, in certain pro-
portions to himself and grandson. The husband's interest in the decree was subse-
quently confiscated by Government for having taken part with the enemy in the
mutiny. He subsequently died, leaving his grandson. The widow died during the
mutiny, and her brother was put into possession of the property, by the Government
as her heir. The grandson now sued the widow's brother to recover his own and
his grandfather's share, alleging that the lien for dower had been satisfied. *Held*,
the suit was not barred by Act VIII of 1859, section 2.

THIS was an appeal from a decision of the High Court, Agra,
dated 18th February 1867, affirming a decree of the Principal
Sudder Ameen of Shahjehanpore.

The suit was brought by the respondent to obtain possession
of a share of some landed property formerly belonging to one
Nawab Ali Khan, and which had been taken possession of by
the Nawab's widow as security for her dower.

* *Present*:—THE RIGHT HON. LORD CAIRNS, SIR JAMES W. COLVILLE, SIR R.
PHILLIMORE, SIR JOSEPH NAPIER, AND SIR LAWRENCE PEEL.

The facts were as follows:—

Nawab Ahmed Ali died in January 1853, leaving a widow, Munsab Begum, entitled by law to one-fourth ; an uncle, Seelamatoolah, entitled by law to another one-fourth ; and a sister, Omrao Begum, entitled by law to one-half.

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The widow claiming the whole estate, which claim appeared at first to have been submitted to by the other heirs, made a gift of two of the villages to the sister, who accepted them.

The sister died in November 1863, leaving a husband, Gholam Hossein Khan, and one grandson, the respondent, her sole heirs ; and the gift of the two villages by the widow was confirmed in favor of the respondent.

In February 1854 disputes arose, and Gholam Hossein Khan, on behalf of himself and the respondent as heirs of Omrao, sued the widow for three-fourths of the estate of the Nawab.

The widow defended the suit on the grounds of her being solely entitled ; of the plaintiff's being at any rate not entitled to more than one-half ; and of her having an unpaid claim for dower, for the payment of which she was entitled to retain possession.

That litigation resulted in a decree of the Sudder Court, dated the 14th February 1857, declaring Gholam Hossein Khan and the respondent entitled to one-half of the Nawab's estates ; but that as the widow had a claim of rupees 10,000 for unpaid dower, she was entitled to a lien on the shares of these parties until they had paid their share of the dower.

The decree recognized the shares of Gholam Hossein Khan and the respondent to be respectively three-fourths and one-fourth of the moiety.

The Indian rebellion having broken out, and Gholam Hossein Khan having taken a prominent part as an enemy of the English Government, his property, including his rights under the decree, was seized and confiscated.

During the rebellion, the widow of Nawab Ali Khan died, and Government took possession of the estate.

In May 1861, the appellant, who was a brother of the widow, and no relation of Gholam Hossein Khan, but faithful to the English rule, obtained the land belonging to the Nawab which

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the Government had taken possession of, the Government giving them to him as her heir, and paying over the mesne profits received by them since the widow's death.

On the 23rd of July 1864 Gholam Hossein Khan died, the respondent being his sole heir-at-law, and on the 29th August 1864, the respondent brought the present suit against the appellant, stating the former litigation, the appellant's right having been declared subject to the widow's right of lien, the amount of dower due having been paid off from the mesne profits and otherwise, and the death of his grandfather, and claiming from the appellant the shares to which the respondent and his grandfather were entitled.

The Government was not originally made a party defendant, but questions having arisen as to whether the respondent's rights had not also been confiscated for rebellion, the Government was, on petition of the respondent as plaintiff, made a party to the suit, and the question as to whether the Government or the respondent were entitled resulted in a decision that there had been no confiscation of the respondent's rights.

On the 16th June 1865, the respondent was allowed to sue *in formâ pauperis*.

The appellant in his written statement relied on the following defences:—1st, that the suit was barred by the law of limitation, the Nawab having died in January 1853, and the order to sue *in formâ pauperis* being in June 1865; 2nd, that the respondent had not deposited the dower money found due by the former decree; 3rd, that he had not paid the costs, &c.; 4th, that he had not deducted the value of the two villages comprised in the gift from the widow; 5th that the mesne profits of the estate had been employed in building a mosque and cemetery according to the deceased's will, and in expenses; 6th, that the account of the mesne profits stated in the plaint was incorrect.

The Principal Sudder Ameen held the respondent entitled to his own share (i.e. 3-4ths) of the moiety to which his grandmother had been entitled, refusing relief in respect of Gholam Hossein Khan's one-fourth, it being confiscated, and declared the respondent entitled to possession on payment of rupees 3, 750, his

share of the dower debt. No account of mesne profits received was directed or taken, but the Principal Sudder Ameen found that the alleged payments of charges for the mosque, &c., were not proved.

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The now appellant appealed to the High Court on the grounds : 1st, that the suit was barred by lapse of time ; 2nd, that it was barred by section 2 of Act VIII of 1859 ; 3rd, an objection as to partial relief which it is unnecessary to refer to ; 4th, that a conditional decree for possession, subject to payment of the dower money, was not right in the absence of actual tender of dower ; 5th, that the two villages mentioned in the gift should have been deducted ; 6th, that the appellant should have had costs.

A counter-objection by the respondent as to dismissing his claim for his grandfather's share was unsuccessful, and need not be referred to.

The High Court (ROSS and PEARSON, JJ.) held that as to limitation there was no bar, the widow's possession not being adverse ; that as to the objection under section 2 of Act VIII of 1859, there being claims set up by government, it could not prevail, although so far as against the heir of the widow the suit might, without tender of the dower money, be considered superfluous and technically incorrect. As to the objection that the tender should have preceded the suit, they held that, if that had been taken before the Court of first instance, it might have affected the question of costs only on appeal. They dismissed the appeal.

The defendant having appealed to Her Majesty in Council.

Mr. *Leith* appeared for the appellant, Mr. *Mackison*. Q. C., and Mr. *Edwards* for the respondent.

Mr. *Leith*.—There are several objections to the suit : 1st, the plaintiff had no title in consequence of the confiscation ; 2nd, if he had any title, his right to possession was subject to the condition precedent that he should pay the dower. [SIR L. PEEL.—If the widow, having a right to dower, was in possession, would she not pay herself off? LORD CAIRNS.—Is it

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Mahomedan law to put a widow in possession as a mortgagee when she has a claim for dower? Mr. *Mackison*—No—*Ameeroonissa v. Mooradoonissa* (1).] It is a primary charge on the estate, and she is entitled to take possession. The decree is that they are not to oust her from her lien while the dower is unpaid. [LORD CAIRNS.—How does it appear she was not paid; surely it must be a matter of account?] There is no cross-appeal. The suit was a simple action of ejectment for three-fourths. [SIR J. COLVILLE.—The plaintiff comes into Court and says, 'by receipt of the rents and profits you have been paid off.' LORD CAIRNS.—There ought to have been an account.] The Court thought that by Mahomedan law she was entitled to possession: in the absence of a prior tender, the suit should have been dismissed with costs. The property was vested in the Government. Before this suit the rights of the plaintiff as against the Government should have been determined, and having established his rights in law, he ought to have tendered the money due for dower. It was in consequence of the appellant's objection that the Government was made a party; the suit in fact results in a repetition of the decree in the former suit, and is bad under the Civil Procedure Code (2). The learned counsel then commented on the evidence as to there having been confiscation of the respondent's rights.

Mr. *Mackison*, Q. C.—We seek not only to dismiss the appeal, but also to have the decree varied by getting an order for an account. [SIR J. COLVILLE. How can you do so without a cross-appeal?] We hope to be allowed this indulgence. The law in giving a right to *jatu* property in satisfaction of dower limits such taking to the amount of the claim—*Ameeroonissa v. Mooradoonissa* (1). That case gave such a decree as might be followed here by giving us leave to sue for mesne profits. [LORD CAIRNS.—The appellant says: 1st, that the suit is not necessary; 2nd, that there was no deposit; and 3rd, that the plaintiff's rights were confiscated. The appellant himself in his own written statement denies that Government has any title.] The

(1) 6 Moore's I. A., 211.

(2) Act VIII of 1859, section 2.

suit was properly framed ; and even if the objections had any weight in them, it would simply be a question of costs.

Mr *Leith* in reply.—The suit should not have been brought. There was a bar until the orders for confiscation were set aside.

Their LORDSHIPS then delivered the following judgement :—

In this case, so long ago as the year 1855, the widow, who has been termed in the proceedings the Begum, was by a decree of the Court, put into possession of the property of her husband, in order to obtain by that possession payment of her dower, which was fixed by the decree at a sum of rupees 10,000 ; and she during her life-time, and after her death, her heir, who is the present appellant, have continued in possession of the property ever since that time.

What ever might have been the presumption as to payment by means of possession at the end of a year or two years after possession was taken, certainly at the end of fifteen years there would be a very strong presumption either that payment of rupees 10,000 had been effected by means of the possession, unless (as does not appear to have been the case) the value of the property was extremely inconsiderable, or at all events that justice would not have been done unless an account were taken for the purpose of seeing whether, by means of possession payment had been effected.

Therefore, when the present plaint, out of which this appeal originates, was brought before the Court the course to be taken, according to our ideas of what is proper to be done in such a case, would have been to have directed an account (which indeed, was asked by the plaint), for the purpose of seeing what had been the amount of receipts by the Begum and her heir during the time they were in possession, and of finding whether she had, in point of fact, been overpaid her dower, and in that event, making her heir repay the difference ; or, if it was found that she had been underpaid, to order the plaintiff in the suit to pay the difference as the terms of obtaining possession of the estate.

Now, that has not been done ; but the plaintiff has been ordered to pay the exact sum representing that proportion of the whole of the dower of the Begum which corresponds to the

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share of the estate which he claims. If an appeal had been brought, not by the appellant but by the respondent, complaining that scant justice had not been done by that form of decree, their Lordships would have been under the necessity of considering whether there had not been miscarriage of the Court, and whether less of justice had been done to the plaintiff in India than ought to have been done to him.

But no such appeal has been brought. The form of the decree abroad has dismissed the whole of the plaint, except that part of it in respect of which relief has been given, and therefore has, in effect, dismissed the plaint so far as it asked for an account of mesne profits.

There has been no appeal against that, and their Lordships, with some regret, find that in disposing of this appeal, they are unable even to leave open the question of whether in India a decree could hereafter be made for an account of mesne profits.

But now, turning to the grounds of complaint made by the appellant with regard to this decree, their Lordships find them to be these :

The appellant, in the first place, complains that this second suit was unnecessary, and that the respondent, resting upon the former decree, the decree of 1855, might, on tendering his share of the dower, without more have obtained possession of his share of the estate. It is sufficient on that point to observe, that when brought into Court, the appellant assumed no such attitude ; on the contrary, he contested the whole right of the respondent ; and although if he had, upon being brought into Court, said to the respondent, that the only complaint he had was that the suit was unnecessary, and that on receiving his share of the dower he would be ready to give up possession, such an argument might have been urged as now that the suit was unnecessary ; their Lordships think that, after the resistance offered by the appellant to the suit in India, it is impossible for him now to take an objection, which after all is only an objection on the score of costs.

The next objection is of the same kind. The appellant complains that, before instituting this suit, the plaintiff in the suit should have settled with the Government, or the agent of the

Government, the question whether there had been any confiscation of the property of this respondent. That, again, is simply a question of costs. It is simply that a plaintiff with a greater amount of costs has been thrown upon the appellant than would have been thrown upon him if these preliminary proceedings had been taken. Their Lordships are not prepared to say that the form adopted was an improper form, or that it was by any means inconvenient, in proceedings for the recovery of this property, in the same suit to call on the Government Collector to clear away any cloud upon the title that might exist by reason of the argument that the confiscation awarded against Hossein Khan might extend to the property of the present respondent.

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The next objection made by the appellant is that the money—the rupees 3,750—was not tendered before this suit was instituted. Their Lordships think that the decree has done full justice to the appellant on this score. The decree has ordered payment to be made as the terms of the respondent obtaining possession of the property. Then as to the claim for some expenditure upon a mosque, that was hardly urged at the bar before their Lordships; and no right whatever is shown to add that sum by way of charge upon the estate before the estate is given up. Then as regards the two villages which, it appears, were given to the present respondent by the Begum, it is said that those villages ought to have been taken into account in diminution of the share of the property awarded now to the respondent. Their Lordships are unable to see how that could properly be done. It is scarcely credible to suppose that when those two villages were made over by the Begum to the present respondent, the Begum intended to make them over simply as liberating them from her claim and security for dower, for that is the result that would arise from the view taken by the appellant. They were made over by the Begum to the respondent, apparently, by way of gift, and if so, they must have been made over, not out of the portion in dispute, but out of the other portion of the estate to which the Begum was entitled.

Under these circumstances, their Lordships are of opinion that the appeal fails on all the grounds urged by the appellant,

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and all they can do with it is humbly to recommend Her Majesty to dismiss it with costs.

Appeal dismissed.

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Agent for appellant : Mr Wilson.

Agents for respondent : Messrs. Jones and Blaxland.

P. C.*

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June 22.

RUKNADAWLA NOWAB AHMED ALI KHAN (PLAINTIFF) v. HURDWARI MULL AND ANOTHER (DEFENDANTS).

ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT, NORTH-WESTERN PROVINCES.

Benami Purchase in Child's Name—Presumption—Creditors Claiming against Benami-holder—Strictness of Proof.

Although a purchase by a Mahomedan with his own money of an estate in the name of his son raises a presumption of the son's name being used benami for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give as respects strangers a title to the son independent of and adverse to the father.

Where *bond fide* creditors of the ostensible owner of property are claimants on that property, the Court will require strict proof on the part of any one seeking to have it declared that he held it only benami.

THIS was an appeal from a decision of Messrs. Pearson and Spankie, Judges of the Sudder Dewanny Adawlut at Agra, dated the 15th June 1866, dismissing a special appeal from the decision of Mr. Becher, the Judge of Seharunpore, of the 3rd November 1865, affirming a decision of Rai Sukhbaşı Lal, Principal Sudder Ameen.

The original appellant had three sons—Rahmat, Makmud, and Mahfuz.

In 1832, the appellant took from one Bhawani Prasad a conveyance by way of mortgage of mauza Bhansi, in the name of his two elder sons (minors), whose names were registered as owners.

* *Present* : RIGHT HON. THE MASTER OF THE ROLLS, LORD ROMILLY, SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, AND SIR LAWRENCE PEARL.

In 1836, the second son having died, the name of the third son was substituted as owner in his place.

In 1841, the appellant bought, in the name of his eldest son Rahmat, the mauza Babri.

These are the two mauzas in dispute.

In 1857, the third son also died, and the father's (the appellant's) name was substituted for that of the third son as registered owner along with the eldest son Rahmat.

In 1857, the respondents advanced money to Rahmat for which he gave them a bond, and on default being made in payment, the respondents sued him and recovered judgment.

They attached under the decree Rahmat's interest in the estates of Bhansi and Babri. Rahmat died shortly afterwards, and the appellant had his name registered as sole proprietor.

A claim was put in by the appellant objecting to the property being sold in execution against Rahmat, on the ground that his deceased son had no interest in the estate. The claim was rejected.

The appellant then brought this suit to have it declared that he was the real owner of the estate, alleging in his plaint, that the property had been taken in his son's name "on account of expediency, and because, had I made the purchase in my name my daughters, who by custom have no right to inherit, might after my death claim their legal shares."

At the trial, the evidence was conflicting as to the possession by the appellant to the exclusion of his son, and the Principal Sudder Ameen held that, although the purchase was made with the appellant's funds, he had allowed his son to be held out as ostensible owner of the estate, and could not now dispute that ownership as against creditors. He also held that the son had actual beneficial possession. On appeal, the Zilla Judge upheld the decision, deciding the case on the ground that the son's possession having been actual; and having been for more than twelve years, the father could not dispute it.

A special appeal to the Sudder was presented, on the ground that the purchase was by the father in his son's name, but with his own money, and so the possession was not adverse possession.

The Sudder Court rejected the appeal on the ground that the

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appellant himself stated that the reason of buying in his son's name was to oust his daughters from claiming, and therefore it was not competent to the father, the Courts below having found in favor of the son's proprietary and usufructuary possession, to claim the estate whether the father's money alone was or was not used for the purchases.

The appellant having appealed to England, died, and the appeal was revived in the name of his heir, Azmat Ali Khan.

Sir Roundell Palmer, Q. C., and Mr. Leith for the appellant.

The case is one of a purchase by a father in his son's name, and it is a benami transaction with no presumption as to its being an advancement for the son—*Gopeekrist Gosain v. Gungapersaud Gosain* (1). The same rule applies in Mahomedan as in Hindu cases.—*Rungu Mal v. Bunsidhur* (2), *Newazee Ferausk v. Mussamut Atlussee* (3), *Mussamut Beebee Nyamut v. Fuzl Hossein* (4). The sole question is who paid the money; there is no doubt that in this case the father did—*Dhurum Das Pandek v. Mussamut Shama Soondri Dibiah* (5).

Mr. Field, Q. C., and Mr. Bell for the respondents.—Admitting that benami purchases by parents in the names of their children are common and recognized by the Courts in India and in this Court—*Amanee Tewaree v. Rai Rughoo Buns Suhai* (6), *Copeekrist Gosain v. Gungapersaud Gosain* (1), see cases cited in the note (7)—it is a presumption only, which can be rebutted. Here the appellant himself admits that the object was not to create a trust for himself which would have left the property to go to his heirs and not to those of the nominal holder, but to place the property so as to prevent his heirs-at-law succeeding, he in his plaint alleging that his object was to cut out his daughters. This is not such a benami as the cases relied on contemplated: there is in fact actual property in the son. Even

(1) 6 Moore's I. A., 53.

(2) 5 Dec., N. W. P., 147.

(3) 1 Sel. Rep., 31.

(4) S. D. A., 1859, 139.

(5) 3 Moore's I. A., 229.

(6) 3 Sel. Rep., 366.

(7) 6 Moore's I. A., 87.

if the father's admission as to his object in purchasing in his son's name could be disregarded, the Court will, where *bonâ fide* creditors of the nominal owner are seeking to enforce their rights against the property, watch the allegation of a benami with great jealousy.

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Mr *Leith* in reply.

Their LORDSHIPS having taken time to consider, delivered the following written judgment:—

The Nawab Ruknudawla, the original appellant, has died pending this appeal, and is now represented by his son, the Nawab Azmat Ali Khan. The original appellant will, to prevent confusion between them, be called the Nawab in the observations of their Lordships on this case. This appeal is brought from a decision of the late Sudder Dewanny Adawlut at Agra, affirming a decree of the Judge of the Zilla Saharunpore, who had affirmed on appeal to him a decree of the Principal Sudder Ameen of that place, dismissing the suit of the Nawab against the present respondents.

The respondents, by trade bankers, were creditors of a deceased son of the Nawab, named Rahmat Ali Khan. The debt was evidenced by an instrument in writing, in the usual form there of a bond; but this instrument does not appear to have been a mortgage bond hypothecating any property of the debtor. The respondents obtained a decree in the Civil Court of Saharunpore for the amount of their demand against Rahmat, who died before execution was had on that decree. The respondents, after the death of Rahmat, proceeded, agreeably to the law and practice of the Court, to attach the property of their debtor, in order to obtain payment of their debt. They were proceeding to bring to sale the property which is the subject of the present appeal, when the Nawab intervened in the execution proceeding as an objector, claiming the whole property as his own absolutely, and stating the deceased Rahmat to have been merely a fictitious or benami holder of the property for his father the Nawab. The Judge of that Court, for reasons which it is unnecessary here to state or consider, refused to allow the Nawab to proceed on that objection, and referred him

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to a regular suit. The Nawab, accordingly, preferred his claim by a civil suit against the respondents, viz., the original suit before referred to in the Court of the Principal Sudder Ameen of Saharunpore. The properties sought to be recovered are named respectively Bhansi and Babri.

The whole contest in this suit was whether Rahmat held these properties benami for the Nawab. No case was made by the Nawab that the son had a postponed interest or estate in the property. Such a case, even if substantiated, would not have enabled the Nawab, as an opponent of the sale, to defeat by intervention the claim of the creditors wholly. The ordinary mode of conveyance under such a judicial sale, viz., of the right, title, and interest of the debtor, would have enabled the creditors to realize their debts, or some portion of it, by a sale of the interest, whatever it might prove to be. The Nawab instituted no suit to protect any alleged life interest in himself against a title derived under the judicial sale. The Court, therefore had in the Nawab's suit simply to decide whether he had proved his son Rahmat to have been, from the time of the conveyance to Rahmat until the death of the latter, a benami holder of these properties for the Nawab.

The title to Bhansi was one derived originally by mortgage. The owner, Uzir Ali, mortgaged this with fifteen other mauzas to one Bhawani Prasad for a certain sum, which, by a second advance and charge, amounted to 26,400 rupees. Bhawani Prasad, as the Nawab alleged, sub-mortgaged the whole sixteen mauzas to him for the same sum, and he, according to his statement, had the conveyance taken benami, in the name of two of his infant sons, of whom Rahmat was one. The other of these two sons died young; on his death, the Nawab, who was his heir, substituted another son. This son died young, unmarried, and without issue; his father was his sole heir. The interest therefore of Rahmat, if real, was to a moiety of this share of Bhansi originally conveyed to the two sons. The title to Babri was by conveyance, as upon an ordinary purchase, for a money consideration, and the conveyance was in the name of Rahmat. Some contest has been made about the real facts of this purchase, and the respondents deny that it was, what it pur-

ports to have been, a purchase at all ; but in the view which their Lordships take of this case, it will be unnecessary to advert further to this head of contention, or to distinguish further between the titles of the respective properties, since the explanation of the Nawab as to the reason for the conveyance to his sons applies alike to both properties.

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The case made by the Nawab at the hearing of this appeal before their Lordships was, that the funds which purchased both properties were exclusively the funds of the Nawab ; that a legal presumption thence arose that the proprietary right was the Nawab's and that the respondents, who have no better title than that of Rahmat, have not rebutted this presumption. The counsel for the Nawab relied on the case of *Gopeekrist Gosain v. Guugapersaud Gosain* (1), which they contended had been disregarded in the decision of this case in the Courts below.

Had this appeared to their Lordships to have been so, they must necessarily have recommended to Her Majesty to reverse the decisions under appeal, since the law as to benami conveyances taken by a father in the name of a son, whether in Hindu or Mahomedan families, should be considered in all Courts in India as conclusively settled by that decision.

It becomes necessary, therefore, to see what were the real grounds of the decision in the Court of the Principal Sudder Ameen. It appears to their Lordships that that Judge found as a fact that the Nawab purchased the property with his own funds ; a conclusion which, on the evidence before him, and in the absence of all evidence of property at that time in the sons, their Lordships think a reasonable and proper conclusion. Had this fact received no other addition than that the conveyance was taken in the names of the Nawab's sons, the case would have fallen within that of *Gopeekrist Gosain v. Gungapersaud Gosain* (1), and the argument for the appellant must have prevailed with their Lordships : but the Principal Sudder Ameen remarks, and relies on a very important addition to these facts, in the Nawab's own explanation of the cause of the

(1) 6 Moore's L. A., 53.

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conveyance to his sons ; the Court thence inferred that a motive existed for it in the state of his family, the existence of daughters and his desire, as expressed, to vary the rule of succession between sons and daughters in his family. The Sudder Dewanny Adawlut also, in their judgment, rely on these additional facts.

If the conveyance to the sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between sons and daughters, it could not be designed as a mere naked benami conveyance, because, as Mr. Bell correctly observed, a mere benami conveyance would in no way affect such succession. But if, as the Nawab himself represented the transaction, it was designed to affect the daughter's claims, or interests, it could only so operate as a real transaction ; that is, by a conveyance of interest to the sons. It is immaterial in this case to consider whether the legal effect of the arrangement would be to confer a resulting life estate on the Nawab or not, since the only contest made in the suit was whether it was an absolute benami transaction. The case admitted, certainly, of being viewed thus, that the conveyances were merely colourable, to be treated as real should it become necessary to defeat a daughter's claim, but fictitious as between father and sons. It is to be observed, however, that this view of the case was not presented to the Judge ; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against creditors of the son made after the son's decease in favour of the father, alleging his own fraud. Their Lordships, therefore, think that the Principal Sudder Ameen was justified in regarding the whole evidence before him as not sufficient to establish the case of benami ownership, which the Nawab advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of creditors against property of which their debtor was allowed for many years to have at least the ostensible ownership, it is one which their Lordships would not disturb, unless it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the objec-

tor to the rights of creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family property out of reach of creditors. If the father became indebted, the titular right would be then stated to have conveyed the real interest; but if the son were indebted, then the claim would take the form to which this suit is adapted. Views of these dangers to the rights of creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed with costs.

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Appeal dismissed.

Agent for appellant: Mr. Wilson.

Agent for respondent: Mr. Oehme.

[APPELLATE CIVIL.]

Before Mr. Justice Kemp and Mr. Justice Glover.

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Jan. 12.

MUSSAMAT RAJ KUNWAR, *alias* SHOMURAT KUNWAR, (DEFENDANT) v. MUSSAMAT INDIRJIT KUNWAR AND ANOTHER (PLAINTIFFS).*

Litigation.—Adverse Possession.—Hindu Law.—Alienation by Life-Tenant.—Suit by Reversioners.—Arguments on Appeal and Review.

A daughter succeeded to a share of her father's estate, and transferred it in full property by a formal instrument or *ikrarnama* dated March, 1849, to her grand-daughter, expressly naming her and treating her as her heiress: the transfer being in the nature of a release, reserving maintenance and other advantages to the donor.

Upon the application of the grand-daughter before the Collector for the mutation of names according to the terms of the *ikrarnama*, the reversioners (collateral heirs of the father) affected to contest the unauthorised nature of the alienation, but dropped their opposition. In 1857, the diaras, or alluvial lands attached to the estate, were perpetually settled with the grand-daughter.

* Review, No. 245 of 1869; of the judgment of Mr. Justice Kemp and Mr. Justice Glover, dated the 23rd July 1869, in Special Appeal, No. 32 of 1869.

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The alienor quarrelled with her grand-daughter, and in 1857 brought a suit against her to set aside the ikrarnama, upon the ground of the non-performance of a condition subsequent. The plaintiff succeeded in the first Court, but the judgment was reversed (October 1858) on appeal to the Zilla Judge. Pending the appeal the plaintiff died (February 1858), and the reversioners applied to be, and were admitted as her heirs, to conduct the appeal.

The grand-daughter remained in possession from the date of transfer until 1866 when she died.

In April 1867 the present suit was brought by the surviving reversioner, who claimed to be entitled to recover possession of the property by right of inheritance from the alienor's father. He was one of the reversioners who had been admitted to conduct the appeal in the former suit upon the death of the alienor.

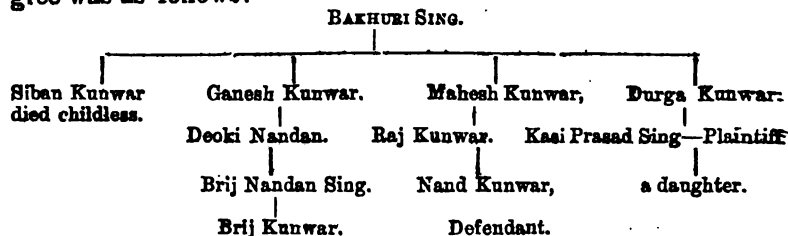
Held (on special appeal and review) there had been no adverse possession; the instrument enured as a transfer of the donor's life-interest only; the judgment in the former suit brought to set it aside, did not bind or affect the reversioners, who, in that suit, merely represented the interest of their predecessor the life-tenant.

In the first Court an issue was raised whether or no the hearing of this suit was barred by the Law of Limitation. One of the grounds of appeal to the Judge was that the Principal Sudder Ameen ought to have held the suit barred as regards the diaras under the special limitation of three years from the date of the Collector's settlement. The Judge did not notice this ground in his judgment. The same ground of appeal was repeated in the special appeal to the High Court, but that Court refused to entertain it for the reason that it did not appear to have been raised in argument before the Judge or in the first Court. On application for review, it was urged that the Court ought to have listened to this ground, but the Court adhered to its former decision.

Counsel should not be heard to re-argue a case on review upon the same points as were argued in special appeal.

THE plaint (filed 30th April, 1867) was for possession and collectorate mutation of a four-annas share of certain mauzas and chur lands, by right of inheritance from plaintiff's maternal grandfather; also to cancel an ikrarnama.

The estate claimed descended from Bakhuri Sing, who died in 1219 B. S. (1812); his heirs were four daughters: the pedigree was as follows:



The right of the four daughters to share equally their father's

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estate had, in 1245 B. S. (1838) been declared by a decree of the Sudder Dewani Adálut. The present suit related to the share of Mahes Kunwar. The ikrarnama complained of was dated 18th Chaitra 1256 F. (26th March 1849), and was executed by (an authorised agent of) Mahes Kunwar. It recited that the four daughters had, in pursuance of the decree of the Sudder Court, taken general possession of their father's estate ; that certain embarrassments had occurred, and that suits had to be brought for possession and recovery of portions specified ; that Mahes Kunwar, "owing to her dotage, is incapacitated and disqualified from managing property and conducting the affairs connected with the villages and Courts with reference to the four-annas share, as there is no permanency to this borrowed life, and as, besides Nand Kunwar, her grand-daughter by a daughter, she has no other lawful heir." The instrument then makes over and conveys the four-annas share, stating the value at Co.'s Rs. 40,000, and makes Nand Kunwar owner, 'on these terms, viz. that she should pay to the creditors of Mahes Kunwar Rs. 9,207-12 (as scheduled), should recover complete possession and get herself recorded as owner of all the lands (described), with the exception of certain mauzas which were to remain in possession of Mahes Kunwar for the remainder of her life : "on her death Mussamat Nand Kunwar, heiress of the said proprietress, shall bring into her possession" the last-named mauzas, and that, beyond taking the profits for her life, Mahes Kunwar should have no authority to incumber or alienate or in any way affect those mauzas, which (the instrument goes on to say), "the said heiress shall, after the death of Mahes Kunwar, have full power to manage, settle, execute deeds of sale or gift, or otherwise dispose of as proprietress thereof," with other expressions shewing the intent and belief that the full disposable property passed to Nand Kunwar. The instrument concludes, "should Mahes Kunwar in future violate the terms of this instrument in any way, such violation shall not be good and valid in Courts."

The ikrarnama was duly registered on the 9th April of the same year.

In July 1849 (12th Sraban 1256 F.) Nand Kunwar applied

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in the Patna Collectorate, for mutation according to the ikrarnama, and was supported by Mahes Kunwar. The rubakari of the Deputy Collector recites, *inter alia*, the arrangement as to a portion, and "that after the death of the afore-named lady the share in &c. which, under the conditions of the ikrarnama, remains in the possession of the said lady shall be the property of the petitioner &c." The rubakari also recites that, on the 30th May, a petition was filed by Kasi Prasad Sing, stating that he was the heir of Mahes Kunwar; that the said lady had no authority for alienating the joint ancestral estate to any other person, and praying for the postponement of the mutation of names, also, that a notice had been issued and served for the objector to put in an order of a Civil Court within fifteen days prohibiting mutation, and that the petitioner and Mahes Kunwar had put in answers to the objection. After expiry of the fifteen days, the objector's claim (not being further heard of) was rejected, and the mutation ordered. This order was not appealed. In April 1857, the diaras, or alluvial lands, attached to the estate were perpetually settled with Nand Kunwar, as representing the four-annas share. There was no appeal from or attempt to set aside this settlement.

Mahes Kunwar quarrelled with her grand-daughter, and, in January 1857, sued her to set aside the ikrarnama, upon the ground that the conditions had not been complied with. In her plaint she said, *inter alia*, "the object in executing the document in question was that the debts due to the creditors might be discharged, and the estate released, and that no disputes might arise on the death of the client" (Mahes Kunwar). The plaint alleged that no debt had been paid, and that the donee had not got actual possession of any other portion of the estate than the diaras. Mahes Kunwar succeeded in the Court of the Principal Sudder Ameen, whose judgment was however, reversed by the Zilla Judge on 2nd October 1858. Between the judgment of the Court of first instance and that in appeal, Mahes Kunwar, the appellant, had died (February 1858); whereupon, the nephews (Kasi Prasad and Sheo Dey Narayan Sing) appointed a vakeel to represent them in the appeal, reciting as follows:—

"Whereas it is necessary for us, declarants, to file a petition before the Judge of Patna, to represent ourselves as heirs in the place of Mussamat Mahes Kunwar, deceased, in the appeal of Mussamat Nand Kunwar, &c." and stating their object, "that the said pleaders will file a petition to represent Mahes Kunwar."

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So they were admitted accordingly. The Appellate Court in its judgment in favor of Mussamat Nand Kunwar and against the surviving nephew and representative of Mussamat Mahes Kunwar, deceased, observed, *inter alia*, "In the deed, the alieness is called the grand-daughter and only heir of the alienor, and she is made mistress of the property; and though she takes the incumbrances with the property, she is no way fettered as to how or when they are to be paid off." And the Judge notes, "whilst the case was pending in appeal the plaintiff deceased, and is now represented by parties claiming to be her heirs." Nand Kunwar continued in possession till she died, in 1866.

In April 1867, the surviving nephew filed the plaint in this suit. The plaint states his cause of action to have arisen upon the death of Mahes Kunwar, February 1858, refers to the suit of the latter to annul the ikrarnama, and says—"After the decease of the said Mussamat Mahes Kunwar, all the heirs appeared in that case in appeal, and in their presence the claim of Mahes Kunwar for annulment of the ikrarnama was dismissed; but that suit did not involve any question as to the Mussamat having no authority to execute the invalid ikrarnama, nor was it adjudicated upon." A defence was raised on behalf of an alleged infant daughter of Nand Kunwar, but that was ultimately abandoned.

The issues of law were: 1st. *res adjudicata*; 2nd. limitation. The issues of fact became immaterial.

Both the issues were decided in plaintiff's favor by the Principal Sudder Ameen. There was an appeal on the ground of the previous decision, of adverse possession and limitation, also of special limitation of three years from the Collector's settlement. There were other grounds upon which the case did not ultimately turn. The Zilla Court held that "Mahes

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Kunwar sued for cancellation of the agreement on the specific ground of breach of conditions. The present plaintiff sues as heir of Bakhuri Sing to set aside the agreement, on the ground that Mahes Kunwar had no legal power to execute it, or at any rate it was only binding on her during her life. This was a plea which Mahes could not put forward, and which therefore could not have been enquired into in the former suit. The plaintiff who joined in that suit in the stage of appeal, as heir to Mahes Kunwar, had no power to re-open the case or to introduce new pleas arising out of a new state of facts not existing when the suit was instituted and decided in the first Court." The Court also held, that the possession of Nand Kunwar, arising in the lifetime of Mahes Kunwar, "was no more hostile to the reversioner than the possession of a farmer. The right to question it arose only when Mahes Kunwar died." The judgement of the lower Court was affirmed. The defendant came up in special appeal to the High Court. The grounds of appeal were, besides the *res adjudicata*, the special bar of three years' limitation as to the diara lands, and other grounds not insisted on; "that the possession of Nand Kunwar, under the terms of the ikrar-nama, being upon her right as heir, and as such clearly adverse to the widow herself as well as to the reversionary heirs, the plaintiff was bound to bring an action within twelve years from the date to the commencement of such possession;" and "that the division among the four daughters of Bakhuri Sing, being in the nature of a family arrangement, by which each got an absolute interest in the separate share allotted to her, and that arrangement having been acquiesced in and acted upon by the plaintiff, he (the plaintiff) is not now competent to deny the absolute proprietary right of Mahes Kunwar."

The case was argued by Mr. Allan and Baboos Krishna Sakha Mookerjee, Chandra Madhab Ghose and Kalimohan Das for the appellants.

Mr. C. Gregory and Baboo Srinath Das for the respondent.

The judgement recites the arguments for the appellant. It was delivered by

KEMP, J.—The plaintiff, special respondent before us, sues to

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recover possession of a four-annas share in the estate of one Bakhuri Sing, the common ancestor, which estate was held by the aunt of the plaintiff, Mahes Kunwar, as life-tenant; the said lady died in the year 1265 (1858) and the plaintiff, on the allegation that in that year the succession opened out to him, sues to obtain possession of the estate mentioned above. The defendants are the heirs of Nand Kunwar, the grand-daughter of Mahes Kunwar: they allege that Mahes Kunwar transferred the four-annas share which she held as a life-tenant, by an agreement dated the 26th March 1849, to her grand-daughter Nand Kunwar, who held possession up to her death under the aforesaid agreement, and died in the year 1274 Fasli (1867), leaving a daughter, Deorani Kunwar, the defendant in this case. Both the Courts below have given the plaintiff a decree. The points taken in special appeal by the senior pleader for the appellant, Mr Allan, were, first, that the suit of the plaintiff was barred under section 2 of Act VIII. of 1859, and second, that it was barred under the general and special law of limitation; and the junior pleader for the special appellant, Baboo Kalimohan Das, objected, that as the property in dispute must be regarded as the stridhan of the aforesaid lady Mahes Kunwar, she had a complete dominion over that estate, and that her grant of the estate to her grand-daughter, Nand Kunwar, was one that she was perfectly competent to make, and that the plaintiff, as reversioner, cannot claim possession of that estate, which must devolve on the heirs of the grantee.

With reference to the first objection, namely, the *res adjudicata* point, it appears that Mahes Kunwar, after executing the *ikrar* in favor of her grand-daughter in 1849, sued to have that *ikrar* set aside, not on the ground that she had not executed it, but on the ground that the grantee had failed to conform to the terms of the *ikrar*. The suit in the first instance was dismissed, but, on appeal, the *ikrar* was upheld in its integrity, and the possession of the grantee was maintained. This took place in October 1853; it appears that Mahes Kunwar, the plaintiff in that suit, died when the suit was in the appellate stage. The plaintiff before us applied to the Court to be made *kai'm-makam* (successor) of Mahes Kunwar, to enable him to carry on the appeal on her behalf; this application was allowed; and he was admitted

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as the words of the order express it "*waste jawabdsahi appeal.*" Mr. Allan contends, that in that stage of the case the plaintiff in this case was bound to disclose his whole claim, and the omission on his part to put forward the whole of his title on that occasion has rendered the decision passed in that case binding upon him, and that his present suit is therefore barred under section 2, Act VIII of 1859. Mr Allan has referred us to *Umatara Debi v. Krishna Kamini Dasi* (1): in that case the Judges held that where a party sues to recover possession of certain lands, first claiming it as part of her talook, and then as '*towfir*,' but in both suits asking for possession of the same land, it follows that the cause of action is one and the same in both suits. In that case, the Judge observed that if the plaintiff omitted to put forward her strongest title or her real title on the first occasion, it was so much the worse for her.

Now, in this suit before us, it is very clear that the cause of action is not the same as that in the suit brought by Mahes Kunwar. In the suit by Mahes Kunwar, who was the life-tenant, she admitted the execution of the ikrar which made over the enjoyment of the life-tenancy to her grand-daughter, but she alleged that the terms under which she had made that grant, namely, that the grantee was to pay her debts, had not been fulfilled. In the present case, the plaintiff sues as a reversioner, and his cause of action arose on the death of the life-tenant, to set aside the agreement between the life-tenant and her grantee, as one which she was not competent to make so as to bind him after her death. It is obvious, that the causes of action are very different in the two cases, but it is said, that the plaintiff, when he took up the case of Mahes Kunwar in the appeal stage, ought to have at once disclosed his title, and to have claimed as reversioner. We do not think that it was at all necessary for him to do so, the issues in that case involved merely a question of whether the grantee had fulfilled the terms of the ikrar or not; and therefore as observed by the Judge, the plaintiff "was unable to introduce any pleas arising out of a new state of facts not existing or before the

(1) 2 B. L. R., A. C., 102.

Court when the suit was instituted and decided in the first Court. We therefore overrule the first plea in bar.

On the second plea on the general law of limitation, it is contended that, if Mahes Kunwar had brought a suit, it would have been barred, and that the reversioner is also barred : *Nabin Chandra Chuckerbutty v. Issur Chandra Chuckerbutty* (1) has been quoted in support of this contention. There is no doubt, and it is now settled law that, if a widow, a life-tenant, in the absence of fraud, allows a decree to be passed, and possession to be taken adversely to her, and that adverse possession lasts for twelve years or more during her life-time, she being barred by limitation, the reversioner would also be barred ; but this is not the case in the present instance ; the possession of Nand Kunwar, the grantee of Mahes Kunwar, is not an adverse possession. Mahes Kunwar was but a life-tenant, and with her consent the life-tenancy was made over to Nand Kunwar to endure during the life of the grantor. On the death of the grantor the right of succession opened out, and the permissible possession of the grantee, Nand Kunwar, ceased and determined. Nand Kunwar did not claim to hold as heiress, and, therefore, her possession was not hostile by Mahes Kunwar ; this second objection is therefore overruled.

The third (2) ground on the special limitation law was not raised in the argument before the Judge, or in the first Court ; we therefore think it unnecessary to enter into it in special appeal. The last point taken by the junior pleader, namely, the question of stridhan, is wholly untenable ; this property was not acquired to Mahes Kunwar by gift from her parents, or from her husband at the time of her marriage, and can in no way be called stridhan. All the grounds taken in special appeal therefore fail, and the special appeal must be dismissed with costs.

The case now came on upon an application for review of judgment. The grounds of review filed were :—

“ The main questions in this suit resolve themselves into one *viz.*, the construction and operation (in law and in fact,) of the *ikrarnama*.

“ This was a complete alienation ; and has always been so

(1) Case No. 460 of 1867 ; April 29th, (2) This was the fourth ground of special appeal.

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treated, by Judges, by Revenue authorities, and by all parties, including these plaintiffs.

" Having no privity with Mahes Kunwar, they became her *kaim-makam* (i. e., successors) in the suit to avoid and get rid of the *ikrarnama*, an instrument and dealing directly adverse to their interest.

" The judgment in that suit, therefore, bound these plaintiffs, *viz.*, in the definition and construction of the *ikrarnama* and its operation.

" If the plaintiffs did not hold that instrument, and what was done under it, to be an alienation out and out, the suit to them was wholly immaterial; their intervention would have been meaningless, inasmuch as there was no pretence of any ground of necessity to sell the inheritance, *e. g.*, debts of Bakhuri Sing.

" From the date of the *ikrarnama*, in 1849 (indeed earlier), the property in dispute has been dealt with (not merely openly, but with the proved knowledge of these plaintiffs) in a manner wholly inconsistent with the title of Bakhuri Sing's heirs; yet, although Makes Kunwar died in 1858, this suit is the first effort to establish their title.

" Your Lordships refused to hear any argument upon the fourth ground of special appeal, because your Lordships inferred that the point had not been argued before the lower Courts. Your petitioner submits that this fact did not satisfactorily appear, so as to exclude your petitioner's *vakeel* from the argument; further, that even had it so appeared, so important an objection, specified as it was in the grounds of regular appeal, should have been listened to by your Lordships."

Mr. Montrieu and Mr. Mackenzie (with them *baboo Kabi Mohan Das*) for petitioner.

Mr. C. Gregory and Baboo Srinath Das for opposite party.

Mr. Montrieu (1).—This case is the strongest possible of

(1) Before the argument commenced, the Court objected to counsel being heard at all, inasmuch as the review sought was either a repetition of the previous argument, merely re-discussion of former grounds, or it was upon grounds that had not been before argued

or offered. Ultimately, the argument was allowed to proceed. The preliminary argument and discussion (as to whether the argument for review should be heard) was similar to that already fully reported in *Bhavabai Sing v. Rajendra Pratap Sahoy*, *ante*, 321; see *ante*, p. 332

adverse possession in the alienee of a female heir, if any circumstances or any laches, if anything short of express public assent (amounting to literal abandonment or release) by the expectant heirs, can amount to adverse possession. The family history, the circumstances preceding and attending the ikrar, its publicity, as well as the mode in which it was carried out, conclusively prove the intent and understanding of all concerned to be precisely and effectively what is expressed in the instrument itself. Indeed, its aspect and intent directly regard, not present possession and arrangement (these being incidentally and as of course provided for), but a preparatory induction of the (supposed and really created) heir—anticipation of an acknowledged succession. Mahes Kunwar clearly did not doubt her own absolute right of disposal. It is not contended that she, in law, possessed that right : but, the more obvious her mistake, the more imperative was it upon those whose rights she persistently ignored, to assert them efficiently, so as to protect, not only themselves, but others, from the delusion and consequences of that mistake.

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The bargain of the ikrar would have been futile and one-sided (irrespective of the plain words and meaning of the instrument) on the supposition that those who were parties or privy to it thought that it could be considered to enure to be effectual only for the short residue of the widow settler's life. The stress of the bargain, as the reason of it, was, that but a little space at all events would intervene before Nand Kunwar's absolute succession. So it was always dealt with, in every Court and by public authorities : once only was a feeble opposition offered, on the mutation, and the fact that that was abandoned is sufficient to prove the heirs' consciousness of the real character of the ikrar. So with the contest in Mahes Kunwar's suit. The intervention of the plaintiff and his brother, as her heirs (wrongly so called, although her *kaim-makam* in the event of the ikrar being avoided), is wholly unintelligible if they considered their title to be paramount to the ikrar. What to them were the conditions or the validity of the ikrar, if they did not believe themselves to be bound by it—if they knew or thought it dropped with the widow's life—was extinguished and annulled

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by what had occurred, her decease? The only persons possibly interested were, perhaps, her personal heirs, in respect of rents in arrear: but, with her estate, this plaintiff could have no concern.

The object of this review is to obtain a general principle. The cases do not go the length of asserting, that, in no conceivable case or state of things, is adverse possession possible, under a widow or other female heir's conveyance, against an heir looking on and not objecting; nor is the case of *Govindkishore Roy v. Radhamadhob Adheekares* (1) expressly overruled. It is submitted that the present case calls for a decision of the general principle involved. The question, on the facts here, may be put thus:—if a Hindu female, having a woman's estate in property descended from her husband or her father, deal with that property notoriously in a manner plainly inconsistent with her limited title, and so as to be obviously and confessedly an entire repudiation of the title of the reversioners (her husband's or her father's heirs), those reversioners showing all the while full understanding of the position, and even making a feint (but no effective attempt) to interfere with the proceeding, as unauthorized and adverse to them,—Can they (the reversioners), eighteen years after the adverse dealing was entered on, viz., the alienation with possession under it, and nine years after the alienor's death (when their own succession opened) sue the alienee's heir for possession? (*Doe d Smith v. Webber* (2), and *Lewis v. Rees* (3) were referred to). Burton, in his 'Elementary Compendium,' page 145, upon the difficulty of establishing adverse possession between co-sharers, says:—"If, however, any ostensible conveyance of the whole land be made to the use of a stranger, it can hardly be contended that an exclusive enjoyment by the latter is not a commencement of adverse possession." It is not denied, that express assent of the heirs would have given full validity to the ikrar, according to its terms; and what has occurred is stronger than the analogous case put by Burton. The widow was,

(1) S. D. A., 1856, 450. This case *Kishore Rase*, S. D. A., 3rd August was afterwards strongly contested on 1850, 369.

review. See S. D. A., 1857, 377; see also (2) 3 Nev. & Man, 746.

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in a sense, full owner, as her father's heir ; but the collateral heirs were entitled to interfere if she exceeded the privileges or incidents of female inherited ownership : this she notoriously did ; the whole proceeding was (and was by all understood to be) a denial and defiance of the reversioners' expectancy (1).

Mr. Mackenzie, on the same side, referred to *Payne v. Constable* (2), and contended that the Court was bound to consider the point of limitation and deal with the case accordingly, although the point was not perhaps clearly taken in the pleadings. The act regarding limitation did not affect the jurisdiction of the Court to try the case. Whether or not the plaintiff was too late in instituting the suit was a question of fact which the Court was bound to notice along with every other fact in the case. Whenever it shall appear that a suit has not been instituted within the period of limitation made applicable to a suit of that nature, the Court is bound to hold that the suit shall not be maintained (3).

Mr. C. Gregory and Baboo Srinath Das for the opposite party.

KEMP, J.—This is an application to review our judgment, dated the 28th July 1869. The case, when it was before us in special appeal, was argued at great length on both sides ; by Mr. Allan for the special appellant, and Mr. Gregory for the special respondent. I (speaking for myself) have had considerable difficulty in following the argument of the learned counsel, Mr. Montrion ; I therefore prefer taking the grounds of this review as stated in the application for review, and as far as my memory serves me, I shall briefly notice the arguments of the learned counsel on the points taken in review. The first question which arises in the application for review is the construction and operation, in law and in fact, of the ikrarnama ;

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- (1) See *Jowala Buksh v. Dharum Sing*, of Bengal (4 Moore's I. A., 466), an objection that the right of Government to sue
10 Moore's I. A., 511.
(2) 1 B. L. R., O. C., 49. was barred by limitation, was taken up
(3) In *Maharaja Dheeraj Raja Mahatab Chund Bahadur v. The Government* for the first time in appeal before the Privy Council and allowed. †

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2ndly, the conduct of the plaintiff in the case originally brought by the life-tenant, Mahes Kunwar, against the donee under the ikrar; and 3rd, the question whether this Court should have, as contended in the application for review, listened to the objection contained in the 4th ground of special appeal, namely, the question of whether the special law of limitation applies or not, and whether, in the absence of any arguments in the Court below on this point, this Court was bound to notice the point in question.

On the construction and operation of the ikrarnama, we have already in our former decision pronounced an opinion. We have held most distinctly that under that ikrarnama nothing but the life-interest of the donor passed. The learned counsel, Mr. Montrion, has contended that the ikrarnama is a complete alienation of the title of Mahes Kunwar, the donor, and that the possession of Nund Kunwar under that ikrarnama was adverse to the donor; this question had already been argued by Mr. Allan, when the case was heard in special appeal, and we have, right or wrong, pronounced an opinion upon the question. The plaintiff in this suit is a reversionary heir; it is true that during the life-time of Mahes Kunwar he might have brought a suit for the purpose of having it declared that the ikrarnama was not binding upon him when the succession opened out to him, but that suit, if brought, could only have been in the nature of a declaratory suit; moreover, the plaintiff's right to recover at all depended solely upon the fact of his being the heir, not of Mahes Kunwar, but of Bakhuri Sing, at the time of the death of the life-tenant. The mere fact, therefore, of the reversioner not having brought a declaratory suit in the life-time of the life-tenant to have it declared that the ikrarnama was an alienation not binding upon the reversioner when the succession opened out to him, does not in any way preclude him from bringing a suit when the cause of action accrued to him as heir of the last proprietor, namely, Bakhuri Sing. Now the donee, under the ikrarnama, was not under the Hindu law either the heiress of Bakhuri Sing or of Mahes Kunwar; Mahes Kunwar thought proper for purposes best known to herself to make over the property, which she held as life-tenant, to Nand Kunwar on these terms, that

Nand Kunwar was to pay the debts of the donor, and that, with the exception of certain estates which the donor reserved for her maintenance, the donee was to take possession of the rest of the estate and to procure the registration of her name on the rent-roll of the Collectorate. It is contended by the learned counsel, Mr. Montrion, that this was a complete alienation, and that looking to the conduct of the plaintiff, the reversionary heir, in allowing mutation of names to take place, and in taking no steps to question this ikrarnama at an earlier stage, he has accepted it as a complete alienation, and is now barred by the adverse possession of the donee under that deed. The learned counsel has also contended; most strenuously, that unless under no circumstances can an alienation by a Hindu widow, and the possession under that alienation be considered adverse to the reversionary heir, it must be held in this case that, looking to the terms of the deed itself and to the conduct of the reversionary heir, the possession of the donee was adverse.

I am of opinion that the possession of the donee was not adverse to the reversionary heir. There are, of course, cases in which, where a cause of action accrued to the widow during her lifetime, and where she neglected to assert her right, and permitted a third party to hold possession adversely to her, and that adverse possession endured during the life-time of the widow for a period beyond that prescribed by the law of limitation, the possession of the third party which was adverse to the widow, would also be adverse to the reversioner; and it is to a case of this description that the Full Bench ruling to be found in *Nabin Chandra Chuckerbutty v. Issar Chandra Chuckerbutty* (1) applies. In that case the point is referred by a Judge of this Court well versed in Hindu law; Mr. Justice Mitter was of opinion that limitation would not run against a reversionary heir under the Hindu law until after the death of the female heir who succeeded to the estate of the deceased proprietor. Now here was an opinion which was entitled to considerable weight and respect. The learned Judges sitting on the Full Bench pronounced separate judgments, that is to say, three

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(1) Case No. 460 of 1867, April 29th, 1868.

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tor, it is clear to me that, to use the words of Mr. Justice Macpherson in the judgment just quoted, "this is an improper giving away of the estate of the deceased proprietor" by the life-tenant, Mahes Kunwar. The donee, under the ikrarnama, took possession of the estate with the permission and acquiescence of the life-tenant Mahes Kunwar; the donee, as already observed, was not the heiress of the deceased proprietor or of the donor Mahes Kunwar: her possession was a permissive possession, and was not in any sense adverse or hostile to the reversioner. With reference to the conduct of the plaintiff in the suit subsequently brought by Mahes Kunwar, upon which great stress has been laid by the learned counsel, Mr. Montrion, I would observe that that suit was brought during the life-time of Mahes Kunwar. She sued to set aside that ikrarnama because, and solely because, the donee under the ikrarnama had not fulfilled the conditions under which the gift was made, namely, she had not paid the debts of the donor. Mahes Kunwar did not dispute the execution of the ikrarnama, and the donee Nand Kunwar did not claim as heiress of Mahes Kunwar, but claimed solely under the ikrar, and the issue was whether the terms of the ikrar had been complied with or not. It is to be remembered that Mahes Kunwar won the suit in the first Court, namely, she succeeded in establishing that Nand Kunwar had not acted up to the terms of the ikrarnama. Nand Kunwar appealed, and it was in this stage of the case, and after the death of Mahes Kunwar, the respondent in that appeal, that the present plaintiff appeared in Court. It has been said, as was contended by Mr. Allan, when the case was heard in special appeal, that the plaintiff, when he appeared, as representing Mahes Kunwar in the appeal, ought, to use the words of Mr. Allan, "to have shown his whole hand," that is to say, he ought not to have contented himself with taking up the case as Mahes Kunwar left it, but that he ought then and there to have declared that he was the reversioner, that he was not bound by the ikrarnama, and that he was entitled to possession. Now, in our former decision this point was fully discussed, and our judgment was given upon it; and in my opinion it is not right, when a case comes up on review to re-argue it entirely upon the same points: it is not because learned counsel think that the judgment of

this Court is wrong (and it may be wrong,) that they are entitled to re-open and to re-argue for two days a point which has already been argued at great length by one of the leading pleaders of this Court ; however, be that as it may, I proceed to add to the reasons already given in the former judgment of this Court, such further reasons as in my opinion meet the argument of the learned counsel on this point. I have already remarked that Mahes Kunwar had won the case in the first Court. The plaintiff, on the death of Mahes Kunwar, applied to the Appellate Court to be admitted to carry on the case in the room of Mahes Kunwar, and the order of the Court was that he be admitted "*waste jawab-dehi appeal*," that is to say, to carry on the appeal. At that stage of the case, the plaintiff, to whom the succession to the estate of Bakhuri Sing had but just opened out, was not in a position to raise an entirely new case which had not been tried in the Court of first instance, and which was not in issue between the original parties to the suit, and therefore the mere fact that he did not at that stage of the case disclose his title, does not, in my opinion, lead to the inference that he in any way admitted the ikrar, or that because the ikrar was found by the Appellate Court to be binding as against Mahes Kunwar the life-tenant, it was equally binding upon the plaintiff the rever-

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With reference to the last ground of review, which was that this Court ought to have listened to the plea raised in special appeal, with reference to the objection taken in the grounds of appeal to the judge that the special law of limitation barred the plaintiff's suit, I am of opinion that it does not appear either on the pleadings or in the judgments either of the first Court or of the Judge (which is wholly silent upon the point), that this plea was put in issue (1) in the first Court, or was argued before or pressed upon the Judge in appeal. In the first Court, I can find no argument or plea with reference to the special law of limitation. The judgment of the first Court proceeds to try the issue in bar with reference to the twelve years' limitation, and not with reference to the special term of limitation mentioned for

(1) The issue was general--'Whether or no the hearing of this action is barred by the Law of Limitation.'

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the first time in the grounds of appeal to the Judge. The defendant below, the special appellant before us, did not mention under which section of the Law of Limitation she considered the case of the plaintiff to fall ; moreover, it is not patent on the plaint that the claim of the plaintiff is barred under any of the sections of the Act which prescribe special terms of limitation. The suit was not to set aside any settlement or proceeding of the Collector, but it was a suit for possession, as heir of the late proprietor Bakhuri Sing, of the whole of the properties included in the ikrarnama, and amongst these properties of the diaras for which the special appellant in review seeks to apply the law of special limitation. It is not for this Court to presume that if this plea, that the special law of limitation barred this part of the case, had been addressed to the Judge and pressed upon him, he would so far have forgotten his duty as to have taken no notice of it at all. Some months after the special appeal is decided, nearly six months after, we are asked to send for the pleader who argued the case in the Judge's Court, and to examine him, but we think it wholly unnecessary to do so, because if this plea was taken before the Judge, and pressed upon his notice, and the Judge neglected to pass any decision upon it, it was the duty of the applicant for review to apply to the Judge to re-consider his judgment on that point ; not having done so, we can but hold that the Judge not noticing the point in his decision is simply owing to its not having been pressed upon him.

The case of *Payne v. Constable* (1), which was pressed upon our attention, is not at all similar to the case before us ; in that case in the plaint itself it was patent that the claim was one which was barred under the Statute of Limitation. It is true that the defendant did not plead the statute, but the learned Judges to whom the reference was made, held that this was not a question of jurisdiction, but as it was patent on the plaint that the claim was barred, the Judge of the Court of Small Causes was bound to adjudicate on it, although the defendant did not plead the statute as a bar to the claim of the plaintiffs. In this case there is nothing in the plaint to show that the claim of the plaintiff is barred

under the special law of limitation, and as already observed, it was not argued or put on issue in the first Court, and although taken without any specification in the grounds of appeal to the Judge and in the most vague and general terms, it was not pressed upon the attention of the Judge. In my opinion, therefore, we acted rightly in not permitting this point to be taken on argument in special appeal.

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This disposes of all the main grounds taken in review. I adhere to the former judgment of the Court, which entered fully into all the points of the case, and I would reject this application for review with costs payable by the applicant.

GLOVER, J.—I am of the same opinion. With reference to one part of the argument adduced by Mr. Mackenzie, I wish to add, that as all the three Judges in the case of *Payne v. Constable* (1) agreed that limitation was not a question of jurisdiction, the defendant had the power, if he chose, to waive that objection, and for the reasons given by Mr. Justice Kemp, I consider that the defendant in this case did waive that objection.

I concur in rejecting this application with costs.

Application for review refused.

[PRIVY COUNCIL.]

RAJAH LILANAND SING (PLAINTIFF) v. MAHA-
RAJA LUCKIMPUR SING BAHADUR (DEFENDANT).
ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

P. C.*
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July 14, 15.

Practice—Execution of Decrees made on Appeal—Mens Profits.

When the Privy Council declares an appellant entitled to real property of which he was out of possession, and directs the High Court to make the inquiry necessary to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court on being applied to for execution ought, besides giving possession, to ascertain and award the mens profits up to the date of giving possession.

See also
15 B.L.R. 339.

(1) 1 B. L. R., O. C., 49.

*:—Present: THE RIGHT HON. LORD CAIRNS, SIR J. W. COLVILLE, SIR JOSEPH NAPIER. AND SIR L. PEEL.

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An appeal will lie as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council where the property is over rupees 10,000.

THIS was an appeal from an order of the High Court at Calcutta, dated 13th March 1866.

In 1851, the appellant brought a suit against the respondent's father to recover possession of a large tract of hill and forest country, and claiming mesne profits. The question was one of disputed boundary. The Principal Sudder Ameen dismissed the suit with costs. The Sudder Dewanny Adawlut affirmed that decision. On appeal to Her Majesty in Council the decision was reversed, and an order was made in accordance with the judgment of the Judicial Committee, which is set out in Mr. Moore's report (1).

That order, after reversing the decree, but without prejudice to any question which might arise upon the inquiries to be made as after directed, declared that the appellant was "entitled to the mauzas Goremahli and Goruckpur, and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as are not included in the settlement of Havelee; and that the settlement of Havelee comprises only the measured area of 1,23, 207 bigas, and so much of any of the land in dispute as upon the inquiries after directed may appear to belong to or be properly attributable to the Bunkur and Boondoe mehals in the pleadings mentioned, or to the ghauts, of which the same in part consist; and that the rights of Havelee in respect of Bakam do not extend beyond the 129 bigas and 19 biswas mentioned in Beadon's settlement, and which are included in the 1,23, 207 bigas."

It then proceeded thus: "That the High Court of Judicature do inquire what is the nature and character of the Bunkur and Boondoe mehals, and of the ghauts comprised therein respectively, which are included in Piron's settlement, and are therein estimated at Sa. Rs. 1, 116; and whether the same or any, and which of them, included any and what part of, or any or

" what right or interest in the land in question in this suit ;" and it declared that " so much of the land in question in this suit as may upon such inquiry appear to be comprised in the said Bunkur and Boondee mehals or ghauts belongs to Havelee, and that the appellant is entitled to recover the residue of the land in question," and directed the Court " to proceed in the suit as upon the result of such inquiry may appear to be just," and directed that any " costs of the suit already paid should be refunded, and that the Court should deal with such costs, and all other costs of the suit, including the costs, of that appeal, as might seem just, having regard to the declarations aforesaid, and to the result of the said inquiry ;" and it declared that that order should be without prejudice to any proceedings which might thereafter be taken for the settlement of Havelee.

On the 18th March 1866, the appellant petitioned the High Court at Fort William in Bengal, praying that, " according to the order in the decree of the Privy Council, they would be pleased to pass an order for delivery of possession of the manzas decreed, and for payment of the mesne profits thereof as estimated in the plaint, after directing a local investigation ; and that as to the remaining land in dispute, they would also be pleased, according to the order in the decree of the Privy Council, to pass an order for holding a local investigation ; and according to the order in the decree of the Privy Council and all grant pour petitioner the cost of the Privy Council to, the costs of suit with the interest thereon."

L. S. JACKSON, J., thereupon made the following order :—

" Let the directions of the decree of the Privy Council be carried out, possession of the mauzas specified to be given to the petitioners, and the several matters specified to be inquired into by the Principal Sudder Ameen of Bhaurulpore.

" Provided that issue of this order be stayed for fourteen days, within which time the Government Pleader representing the Court of Wards, who is this day present in Court, and has notice, may file a petition of objections, if any.

" The petitioner asks for wasilat, but it appears to me that this Court cannot give anything beyond what the Privy Council in its decree has given."

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Upon this order being made, the appellant prayed for leave to appeal to England on the ground that by the order's refusing mesne profits he suffered a loss of rupees 11,818, being the mesne profits on the 35,000 bigas decreed by the privy Council.

On the 8th January 1867, the High Court granted the leave as a matter of right.

The case now came on for hearing before the Judicial Committee.

Sir R. Palmer Q. C., and Mr. Leith for the appellant.—The effect of the decree of the Privy Council is to declare our title to the property. On applying for possession as a recognition of this title, mesne profits follow as a matter of course. For the usual practice, *Circular Orders*, No. 10, 11th September 1829 and 11th January 1839, No. 29, paragraph 7, may be referred to. There is nothing in the order prohibiting us from claiming what is the result of the property being found to be ours.

Mr. Doynes for the respondent.—The appeal will not lie. It was not granted by a special permission, but as of right. The only power under the Charter to appeal as of right is under section 39 (1). This is not an order on appeal "or in exercise of the "original jurisdiction." The Judge was acting ministerially [LORD CAIRNS.—Must there not be an appeal to Her Majesty if the lower Court miscarry in giving effect to the decree of the Privy Council?] It is an order of one Judge who acts ministerially, and if he be wrong they could apply to the High Court. The circular order is misunderstood—Act XXIII of 1861, section 11.—*Mosoodun Lall v. Bheekaree Singh* (2). [SIR J. NAPIER.—The question of right to interest is very different from mesne profits.] Giving interest is in the discretion of the Court. But as to mesne profits, unless the decree provides for them, the Court executing it cannot award them—*Hurro Ohunder Chowdry v. Sooradhonee Dabee* (3).

Sir R. Palmer in reply.—[LORD CAIRNS.—Is there any case deciding that the Court below can give mesne profits when the

(1) Letters Patent, 1865, s 39

(3) 1 W. R., Mis., 5.

2) 6 W. R., Mis., 109.

Privy Council gives a decree for possession ?] No ; but it is the necessary legal consequence. In this case Her Majesty's order directs the case to go back to have justice done. It has done all that is necessary to show the Court below what it has to do. The Court, however, says, " although the Privy Council has not given a decree for possession, but has only declared the title, we will not act so as to carry out that decree." Are we here to settle the minutes ? Is not the Court below to settle the minutes in accordance with the directions of Her Majesty in Council ?

Their LORDSHIPS delivered the following judgment :—

The appellant in this case originally sued to recover from the respondent certain villages and lands, alleging that on a true adjustment of the boundaries they belonged to the Nizamut Mehals, and [not to Havelee. He claimed also mesne profits. The suit was dismissed by the Court of first instance, and that dismissal was confirmed by the Sudder Dewanny Adawlut.

Their Lordships, on whose recommendation the order in question was made, thought that this dismissal was wrong, and in an ordinary case they would have made the final decree which the Appellate Court in India ought to have made. Not having materials for doing this they suggested the order in question, which declared the appellant absolutely entitled to the villages of Goremah and Goruckpur, and to all the rest of the land in dispute which was not comprised in the settlement of Havelee. By declarations it limited Havelee to 1,23, 207 bigas, including 129 bigas and 19 biswas, part of Beadon's settlement, and so much of the land in dispute as belonged to or was attributable to the Bunkur and Boondee Mehals. It then directed the High Court of Calcutta to make the inquiry necessary to understand what this last-mentioned land was, and to proceed in the suit as upon the result of such inquiry might seem just,—dealing with the whole question of costs, including the taxed costs of the appeal.

Now, in this state of things, their Lordships are of opinion that the appellant might well have waited the result of those inquiries and accounts before applying to the High Court in Calcutta for the execution of the earlier part of the decree with reference to those villages to which he was declared entitled ;

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and their Lordships also are of opinion that the High Court at Calcutta might well have declined, if they had been so minded, to execute the earlier part of the decree until they had completed the whole of the inquiries and accounts. However, the appellant did apply to the Court for the execution of the part of the decree which related to the two villages of Goremahi and Goruckpur, to which his title had been declared, and the single Judge of the High Court, on whom appears to have devolved the duty of answering the application, was willing to execute, and proceeded to execute the decree, so far as regards possession of these two villages. He stated his opinion to be, that with regard to mesne profits, inasmuch as the order of Her Majesty in Council had not specifically mentioned anything about mesne profits, it would not be proper for the Court in India, in executing a decree, to make any order with regard to the mesne profits.

That order standing would of course be an impediment hereafter, even after the inquiries directed by the other part of the decree were completed, in the way of any application by the appellant on the subject of mesne profits from those two villages; and, inasmuch as their Lordships are of opinion that had the first part of the decree stood alone, it would have been one of the consequential directions proper to be given, to ascertain the amount of mesne profits at the time that possession of the villages was given, they think that, inasmuch as one part of the decree, namely, that with regard to possession, has been executed by the High Court, everything connected with that possession should be executed at the same time.

Their Lordships are of opinion that the right to mesne profits is consequential on the declaration in the decree, and upon possession. They, therefore, think that the High Court should proceed to ascertain, either itself or by an issue properly framed, to be answered by the local Court, what the amount due to the appellant for mesne profits upon these two villages is. They will, therefore, humbly recommend to Her Majesty that an order should be made to that effect; but, inasmuch as the difficulty has arisen, partly by the application of the appellant to execute the decree piecemeal, and partly by the erroneous ap-

prehension which the Judge appears to have entertained of the effect of the decree of their Lordships, their Lordships think it a case in which there ought to be no costs of the appeal.

Appeal allowed

Agent for appellant: Mr. Wilson.

Agents for the respondent: Messrs J. H. and H. R. Henderson.

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P. C.*
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July 14.

MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR,
MAHARAJA OF BURDWAN (PLAINTIFF) v. BULRAM
SING BABOO AND ANOTHER (DEFENDANTS.)

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Act XIV of 1859, s. 20—Execution—Limitation—Proceeding—Ram Sahy
Sing v. Degum Sing (1).

So long as an actual *bond fide* contest is going on in Court between a decreeholder and the judgment-debtor as to the judgment, there is a pending "proceeding" within section 20 of Act XIV of 1859, and the period of limitation must be computed from the Court's decision.

See also
13 B. L. R. 171,
Sup. Vol. 718
and 492.
11 B. L. R. 30,
10 B. L. R.
104.

The decision in the case of *Ram Sahay Singh v. Degum Singh* (1) commented on and approved of.

This was an appeal from a decision of the High Court at Calcutta, dated 20th August 1866.

The appellant was the Raja of Burdwan, the respondents were the grandsons of Khettramohan Sing Baboo and the mother of an infant grandson.

On the 21st December 1829, the then Raja obtained a decree against Khettramohan for rupees 8,100 as arrears of rent.

On the 8th July 1831, an application was made by the Raja that "the Court may execute the decree against the said defendant and cause to give me the amount of decree with interest to date of its liquidation and the costs."

On the 20th September 1831, the Raja made a further application, alleging that the defendant had absconded, and praying for

* Present.—THE RIGHT HON. LORD CAIRNS, SIR J. W. COLVILLE, SIR JOSEPH NAPIER, AND SIR LAWRENCE PEELE.

(1) Case No. 778 of 1865; 11th September 1866.

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execution against his person or estate, the latter being described, and an order was made for attachment of the latter.

A part only of the debt was realized by sale of the attached property, and on the 10th September 1838 the property attached being sold, the suit was ordered to be struck off the file.

At that time the Raja who had brought the suit was dead, and his son (the present appellant) was a minor.

He attained his majority in January 1840, and within twelve years from that date, that is to say June 151, he applied for personal execution against Khettramohan for the unpaid balance, being upwards of rupees 52,000, and an order was made on the 29th September 1852.

On the 18th May 1853, nothing having been done under the order, the suit was again struck off the file.

On the 7th December 1861, the judgment-debtor having died, the Raja applied for execution against the respondents as heirs of Khettramohan, and notice was served on them as reported by the Nazir on 24th January 1862. They objected, 1st that the right to execution was barred by limitation; 2nd that they had no property of Khettramohan.

The Raja traversed those defences, and set out a list of property which could be attached, and the Principal Sudder Ameen passed the following order on 4th March 1862:—

“If there are no objections, let the notice of sale, &c. be written in due order.”

On the 29th November 1862, the Principal Sudder Ameen passed the following order:—

“Whereas the heir of the judgment-debtor is a respectable person, the final process cannot be issued against her. Let the number of the suit be struck off from the record at present.”

On the 20th November 1865, the Raja made a fresh application for execution against the respondents, the sum having then increased to rupees 89,000, and notice of the application was given to the respondents, who met it by the objections that the claim was barred by the Limitation Act (XIV of 1859), and that they as grandsons (the woman being made party on behalf of her son) had no assets.

Mr. Reilly, who had succeeded as Principal Sudder Ameen

held that the law of limitation barred the claim, as Act XIV of 1859 (1) required some proceeding to have been taken within three years next preceding the application for execution, and he calculated dates thus :

Decree	...	...	...	21 Sept. 1829.
Last application	...	...	...	7 Dec. 1861.
Nazir's return of notice served	...	...	...	24 Jany. 1862.
Present application	...	...	...	20 Nov. 1865,

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being three years, nine months, twenty-seven days after the last proceeding by the judgment-creditor.

Against this decision the Raja presented a miscellaneous appeal to the High Court, on the ground that the time ought to have been counted not from the service of the notice but from the date of the case being struck off.

The Court (2) gave the following judgement :—

" It has been held by a Full Bench that the date on which an execution case is struck off the file does not give the decree-holder a fresh starting point from which to calculate the period of limitation. The date from which the time for executing a decree is calculated commences from the date on which any act is done by the decree-holder in good faith, or by the Court in furtherance of execution. We dismiss the appeals."

The Raja having appealed to England, the case now came on for hearing *ex parte*.

Sir R. Palmer, Q. C., Mr. Leith and Mr. Doyle, for the appellants.—(After stating the fact) The case referred to by the High Court must be *Ram Sahaye Singh v. Degun Singh* (5), but if that case decides that the time when the Court had the case before it is to be excluded, it cannot be sound. But it does not so decide : the intention of the decision is to lay down that where the Court is not satisfied of the *bond fides* of the step taken, or where the step taken is that of the Court without originally being put in motion by the party, the step so taken will not be a " proceeding " within the Act (4).

(1) Section 20.

(3) Case No. 778 of 1865; 11th Sep.

(2) Mr. Justice Loch and Mr. Justice Macpherson.

tember 1866.

(4) Act XIV of 1859, section 20.

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Their LORDSHIPS delivered the following judgment :—

The question in this appeal is the proper construction of the 20th section of Act XIV of 1859, which enacts that “ no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce any such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution.” Was there, at any time within three years preceding the application for execution made in the Court below, any proceeding which had been taken to keep in force the judgment, decree, or order originally made in favour of the present appellant ?

What took place was this. The original debtor died. The appellant desired to have the benefits of his judgment against the heir or heirs-at-law. In this state of things he applied to the Judge for process of execution against the respondents as heirs, and on the 26th of December, 1861, this application was made to assume the form of a cause. It was marked and described as 106 of 1861, and was sent by the Judge to the Principal Sudder Ameen, who directed the usual notices to issue. It is the history of that cause which we have to trace for the purpose of seeing whether it was kept alive, or whether it became at any, and what stage, inoperative.

On the 24th of January, 1862, the officer of the Court made his report that another officer, a peon, had gone to the place stated and searched for the judgment-debtors, but was unable to find them, and had affixed the notice in a particular way, and served it upon the village watchman. Then, in February, 1862, the next month, the respondent filed a petition of objections before the Principal Sudder Ameen, not disputing the service of the notice, but objecting to execution proceeding on the grounds that it was barred by limitation, and that no estate of the judgment-debtor had come into their possession. There was, therefore, a *litis contestatio* between the parties to this suit, the defendant to the suit appearing and contesting the right of the plaintiff to have the benefit of the execution against the defendant. In March, 1862, without any delay, the appellant put in

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a petition by way of answer to the petition which the respondent had put in, contesting the allegations in point of law that the respondent had made. In that state of things, both parties having placed their view of their respective cases upon record as it were, on the 4th of March, 1862, the Sudder Ameen ordered that on the last petition, if there were no objection, the notice of sale should be drawn up in due order; and it appears that following upon this, on the 29th of November 1862, a species of hearing was brought on before the Principal Sudder Ameen for the purpose of discussing all or some of the allegations which had been made in these petitions, and it was then, upon that day, the 29th November 1862, that the Sudder Ameen pronounced his opinion: "Whereas the heir of the judgment-debtor is a respectable woman, the final process cannot be issued against her. Let the number of the suit be struck off from this record at present."

Now I pass by the question whether that was meant to be a final judgment, or only a temporary delay interposed in the proceeding of the suit, and I will suppose, for the purpose of argument, that it was meant to be a final judgment. It was at this point, and at this point for the first time, that the suit which up to that time had been pending, was disposed of by any order of the Court, and up to that time there appears certainly to have been no delay on the part of either side. It was prosecuted, and prosecuted *bonâ fide*, and defended, and defended *bonâ fide*; and it appears to their Lordships that so long as that process was going on so long as there were these allegations and counter-allegations as to the right to revive and prosecute the decree, there was a pending proceeding, and it would have been out of the power of the appellant to have done anything but wait for the result, and the order of the Court upon that pending proceeding.

Their Lordships, therefore, were the case not affected by any authority, or by any prevalent course of practice in India, would have no hesitation whatever in holding that there was here a proceeding to keep in force a judgment, decree, or order originally made; that that proceeding was pending every day of the time, and every hour of every day, until it was disposed of on the 29th of November 1862 by the order to which I have referred.

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But it has been suggested in the judgment of the Court, in the present case, that the matter is affected by former decisions of the Courts in India, which had led to a conclusion different from the one which we have expressed. Their Lordships have referred to the case which was cited upon this head, and they desire to say that they see no reason whatever to find fault with the decision in that case. That case appears to have laid down this rule, that all acts done either by the Court, or by an officer of the Court, or *bona fide* by the applicant for enforcing the decree, keeping it in force, would satisfy the term "some proceeding" in the 20th section; but then the Court go on to qualify that by saying that there might be things done by the Court, or there might be things done by the party which might appear at first sight to be steps taken in execution and prosecution of his right, but which really might be done in such a way as so far from showing diligence or vigilance on his part, might be so tainted with want of good faith, that they would lead to a totally opposite conclusion; and in the particular case before the Court they found that there had been an application made to execute the decree; that that had been pending for a considerable time before the Court, and had ultimately been dismissed by the Court itself by an act of the Court for want of prosecution; and applying other general observations to that case, they appear to have arrived at the conclusion that the circumstance that there had been a want of diligence which obliged the Court to dismiss the cause for want of prosecution, made the act of the Court there not to be an act which could satisfy the expression "some proceeding" within the 20th section.

Their Lordships see no reason whatever to disapprove of that decision. It would, as it has been pointed out, be a very strange result if the mere chronicling or recording by the Court of the fact that there had been delay and laches on the part of the litigant such as obliged them to strike the suit off the file, if that act of the Court done under such circumstances were to redound to the benefit of the litigant, and to enable him to say that he had been using due diligence within the period of three years. Not in any way disapproving, therefore, of the decision to which we have been referred, their Lordships are of opinion

that in the present case the proceeding which has been taken now was taken in the period of three years, because it was taken within three years after the order of the Principal Sudder Ameen of the 29th of November, 1862, was made. We, therefore, will humbly recommend to Her Majesty that the order should be reversed, and that the appellant should have his costs of the appeal.

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Appeal allowed.

Agent for appellant : Mr. Wilson.

[APPELLATE CIVIL.]

Before Mr. Justice L. S. Jackson, and Mr. Justice Mitter.

DUBO MISSEER (DEFENDANT) v. SRINIBAS MISSEER AND OTHERS
(PLAINTIFFS.)*

1870
August 18.

Shebait of Hindu Idol Right of a Shebait not Transferable.

The right of a shebait of a Hindu idol to perform the services and receive the customary remuneration is not transferable, and cannot be sold in satisfaction of a decree against the shebait.

THIS was a suit to have the proprietary right of the *sheba* of certain idols in Shashan Damudarpur declared by setting aside a sale whereby the right, title, and interest of the defendants, Ram Panda and Ganga Panda, as shebaits, had been sold and purchased by the defendant, Dubo Misser. The plaint stated that the plaintiffs were the proprietors of the *sheba*, and that Ram Panda and Ganga Panda had no proprietary right, but were mere shebaits appointed by the plaintiffs.

The defence set up by Dubo Misser was that Ram Panda and Ganga Panda were hereditary shebaits ; that the right of the *sheba* was vested in them ; that they had pledged this right to Dubo Misser, in consideration of a sum of money advanced by him ; that he had obtained a decree whereby it was

Special Appeal, No. 182 of 1870, from a decree of the Judge of Cuttack, dated, the 14th December 1869, affirming a decree of the Officiating Moonsiff of that district, dated the 26th August 1869.

1870 declared that the right was liable to sale in satisfaction of the loan ; and that accordingly the right had been sold in execution, and had been purchased by him.

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The Moonsiff held that the proprietary right to the sheba was in the plaintiffs, and that the right to worship (shebaitship) was not (citing *Juggurnath Roy Chowdry v. Kishen Pershad Surmah*) (1) a saleable one. He accordingly passed a decree in favor of the plaintiffs.

On appeal by Dubo Misser, the Judge confirmed the decree of the lower Court.

Dubo Misser appealed to the High Court.

Baboo *Abhai Charan Bose* and *Mahendra Lal Mitter* for the appellant.

Baboo *Chandra Madhab Ghose* for the respondents.

MITTER J.—We are of opinion that the conclusion arrived at by the lower Courts in this case is correct. There can be no doubt whatever that the right which the defendant, special appellant, alleges to have purchased was one which could not be sold, in execution of a decree. The shebait of a Hindu idol has to perform services for the idol, that is to say, to perform the worship of the idol, and to prepare food for it ; and such a right cannot be sold at a public sale in execution of a decree. The special appellant has failed to give us any authority in support of his contention, and we do not therefore find any reason for disturbing the judgment of the lower Appellate Court.

The plaintiffs have established, to the satisfaction of the lower Appellate Court, that they had a right to maintain this suit ; and on this point, no objection has been taken before us in special appeal.

The special appeal is dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

SHEARMAN (DEFENDANT) v. FLEMING AND OTHERS (PLAINTIFF).

1870

June 1.

Sale of Goods—Bills of Exchange, Presumption of Payment of—Production of, by Acceptor—Account Sales—Evidence—Limitation—Acknowledgment—Act XIV of 1859, s. 4.

The plaintiffs in London and the defendant in Calcutta had dealings, which consisted in the defendant shipping jute cuttings and rejections to the plaintiffs in certain quantities and within certain limits as to price; the defendant drawing bills on the plaintiffs in respect of such goods, which the plaintiffs accepted. The plaintiffs alleged that there was an agreement between them and the defendant, that in case of shipments in excess of the limits given by the plaintiffs, they should at their option receive the goods on their own account, or treat them as consignments on account of the defendant, but the defendant denied there was any such arrangement. The defendant made several shipments in excess of the plaintiffs' limits, and the plaintiffs treated them as consignments on the defendant's account, selling them on defendant's account and forwarding him account sales, and drawing bills on the defendant for any balance due to them in the transactions, which bills the defendant refused to pay. The plaintiffs forwarded accounts current to the defendant, in which appeared an item of £188-5-6 as the balance of account current down to December 1866. It appeared to have been due, however, in respect of an account for 1863. The defendant sent a letter, dated 22nd December 1865, to the plaintiffs, which contained the following post script:—"P. 8.—Enclosed a remittance of £40 to old account." In an action brought by the plaintiffs for the balance due to them from the defendant in respect of the shipments which had been treated by the plaintiffs as consignments on the defendant's account, the plaintiffs included the sum of £188-5-6. The suit was brought in November 1868. The defendant admitted he had sold the bills and received the money for them; they were produced by the plaintiffs, the acceptors.

Held, that the bills being produced by the acceptors after due date, and the defendant having received no notice of dishonor, and no demand for payment of the bills, the presumption was that they had been paid by the plaintiffs.

In exercising their option of treating shipments in excess of their limits as on their own account, or as consignments on account of the defendant, the plaintiffs were entitled to treat each shipment separately, and were not compelled to decide on an average of the shipments taken all together.

The account sales furnished by the plaintiffs to the defendant were *prima facie* evidence of the amount realized by the sale of the goods.

Held also (on appeal, reversing the decision of Norman, J.) the words "remittance of £40 to old account" were ambiguous, and did not necessarily import that a further sum was due, so as to constitute an acknowledgment of a debt, which would give a new period of limitation.

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THIS was an appeal from a decision of Mr. Justice Norman. The suit was brought on the 17th November 1868, to recover the sum of rupees 12,011-6-6, the equivalent at the then current rate of exchange of the sum of £1,169-17-3, being money alleged to be due from the defendant to the plaintiffs for money paid by them, between the 31st December 1865 and 31st December 1867, to the use of the defendant at his request, and for interest on moneys due to the plaintiffs, and forborne at interest by them at the defendant's request, and for moneys found to be due from the defendant to the plaintiffs on divers accounts stated between them. The plaintiffs were John Fleming and George Fleming, who described themselves as merchants carrying on business in London under the name and style of Robinson, Fleming and Co., and lately, during the occurrence of the events to which this suit relates, in conjunction with one William R. Robinson, since deceased. The defendant was described as a merchant and agent carrying on business in Calcutta, under the name and style of Shearman and Co.

The plaintiffs stated that, in the years 1865 and 1866 the defendant, as foreign correspondent of the plaintiffs, received orders from them to purchase on their behalf jute rejections and jute cuttings in certain quantities and within certain limits of price; that the defendant on several occasions made shipments to the plaintiffs of an inferior quality to that ordered by them, and at a price exceeding that fixed by them, and drew drafts on the plaintiffs against such shipments; that it was arranged between the plaintiffs and defendant that in case of shipments in excess of the limits given by the plaintiffs, the plaintiffs should have the option of receiving the same on their own account, or as consignments from the defendant on his account and at his risk; that on this understanding the plaintiffs accepted the drafts of the defendant drawn on them against various shipments made by the defendant in excess of the plaintiffs' limits, and advised the defendant of the fact that they received such shipments as consignments on the defendant's account; that they sold the said shipments on the defendant's account, and met the said drafts when due; that thereupon (the sale proceeds of the said shipments being less than the amount

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paid by the plaintiffs in respect of the said drafts) the plaintiffs sent to the defendant account sales of the said shipments, and an account current, and drew bills on the defendant for the balance due to them, but the defendant refused to accept such bills or to pay the amount due; that the defendant, moreover, consigned certain jute cuttings by a certain ship called the *Belle Isle* without any authority from the plaintiffs, and drew a draft on the plaintiffs against the same, and requested the plaintiffs to receive the said cuttings as a consignment and to accept the draft, and the plaintiffs accordingly received the same as a consignment on account of the defendant, and accepted the said draft and paid the same, and having sold the said cuttings, which fetched a less sum than the amount paid by them in respect of the said draft, drew a bill on the defendant for the balance due to them; but the defendant refused to accept the said bill or to pay the sum due in respect of the said cuttings.

In the account sent there was an item for £188-5-6, which the plaintiffs explained as being the balance of account current between the plaintiffs and defendant down to 31st December 1866. The defendant, however, alleged that it was a balance of the account current between him and the plaintiffs down to December 31st, 1863, and of which the last remittance was paid on 22nd December 1865. He submitted it was barred by the Law of Limitation. The plaintiffs submitted that the account had been acknowledged by the defendant.

With respect to this the following extracts from letters were put in to show that there was an old account, and that the defendant had admitted it.

Defendant to plaintiffs, 22nd December 1865.

"P. S.—Enclosed a remittance of £40 to old account."

Plaintiffs to defendant, 31st December 1866 :

"Enclosed our account current made up to date, showing balance in our favor of £188-5-6, which we request the favor of your immediately remitting us, as we greatly desire all accounts of the old firm closed up with all speed."

The defendant denied that there was any arrangement between him and the plaintiffs that, when the shipments were in excess of the plaintiffs' limits, they were to have the option

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of treating it as a consignment on account of the defendant : he alleged that, by an account furnished to him by the plaintiffs in 1864, there appeared to be a balance of £293-13-1, representing certain alleged losses on sales of consignments made to the plaintiffs by the defendant in 1863 ; that though he had reason to complain of the sales, he took no action to recover the losses, being disposed to believe the plaintiffs had acted *bonâ fide*, and relying on their promise of further orders to enable him to make up his losses. He further alleged that it was then (1864) arranged that he should make a remittance on account of the said balance, and that he made a part payment thereof by remitting the sum of £127-3-9, and afterwards several smaller sums ; that in 1865 and 1866 he executed several orders from the plaintiffs for jute, &c., and the plaintiffs shortly before, as well as after, the sales of the various shipments in respect of which this action was brought, promised to send him further orders, but had not done so ; that in respect of a shipment of certain jute cuttings (638 bales) per *anges*, he had made it as a consignment on his own account, but the plaintiffs having sold the said cuttings at a gross profit of £105 (deducting cost and freight), appropriated the said profit, treating it as a consignment on their own account, to which arrangement he had, however, assented ; that other shipments had been treated by the plaintiffs without the defendant's consent, as consignments made by the defendant, on the alleged ground that the cost and freight of the said shipments (exclusive of insurance) exceeded the cost and freight (exclusive of insurance) to which the defendant was restricted by the limits of the plaintiffs ; that he did not consent to the shipments being treated as consignments on his account ; that there were other shipments not included in this action, though made about the same period as those included, which were accepted by the plaintiffs in execution of their orders, and which were considerably under the plaintiffs' limits ; that treating the shipments as a whole, the particular shipments objected to by the plaintiffs on the alleged ground of excessive cost were really shipped under their limits, or within the spirit thereof ; that the principle of treating the shipments that were made about the same period as a whole on

the points of cost and freight, showed the course of dealing between the plaintiffs and defendant, and was recognized by the plaintiffs in their letter dated January 26th 1866, and in previous letters; that the same letter (January 26th 1866) also showed the plaintiffs' understanding as to the footing on which they were entitled to charge losses when orders were executed in excess of their limits; that the plaintiffs had on several occasions sold the goods at a loss, though the market was rising, of which the plaintiffs had notice in the defendant's letters of 8th February 1866, and 22nd of February 1866; and that the plaintiffs had dealt on various occasions with the shipments so as to produce a loss on the sales when they might have sold them at saving or profitable prices.

The following extracts from the correspondence show the position of the parties prior to and during the transactions in respect of which the suit was brought.

Defendant to plaintiffs, 23rd September 1865 :

"Owing to the very slow arrival of jute suited to your order, and the run made on it by American shippers, we found ourselves suddenly brought to a stand by the rise in prices, and utterly at a loss how to satisfy our shipping order for 2,500 bales. In this extremity, and really at the last moment, as we had expectations of jute arrivals, we were forced to accept some consignments of jute cuttings to the extent of 1,325 bales, but the blundering of the captain threw us and others out of our reckoning, he having miscalculated the ship's capacity, so that we had 57 bales of jute shut out, and 657 bales of jute cuttings; we have therefore only shipped 668 jute cuttings, being Weskin's cuttings, and annex invoice for same, amounting to rupees 1,103, and we have ventured to value on you for the above cost, £113-3-5, at six months, and trust you will be good enough to protect the draft; the shipment was unavoidable under the circumstances. This parcel of cuttings stands in £5-13-9 per ton, and if you think proper may be sold to arrive; we have not yet secured ship room for the remainder of the cuttings, which are consignments from Messrs. Stevens and Foggo of this place."

Plaintiffs to defendant, 3rd November 1865 :

"Memorandum for Messrs. Shearman and Co., Calcutta. We would like you to make us shipment of three different assortments of jute, to serve

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as types, on which we could hereafter at any time give you orders, say 150 more bales of that resembling the M. in double triangle assortment, 150 resembling the K. in double triangle assortment, and 150 sorted common jute. We would suggest your shipping the first of these under the mark S. in double triangle A. B. C., S. in single triangle, and S., the two latter being the rejections and cuttings; the second one under the mark KS. in double triangle A. B. C., KS. in single triangle, and KS, the two latter rejections and cuttings; the third one under the mark SS SS, SS, SS, the two latter being rejections and cuttings.
J 1. 2. 3. 4., R C

We would like you to ship all these as speedily as possible by a fast vessel to London, and please make up the quality of each assortment neither too high nor too low, but just such as you think you could readily keep shipping against further orders from us. The parcel you send we would have sold in public sale immediately on arrival, and would call the attention of buyers to them both here and in Dundee with a view of getting you orders, and also with the view of being able, when we give orders ourselves, to sell the jute for arrival, which can always be done as soon as a standard of quality is established. If the price would be extravagantly high, it would be better to delay shipments, as unless the jute crop is really considerably deficient, prices, we think, are being pushed too high. In writing us, please say by what names or numbers we should distinguish the different assortments in telegraphing you about them, and please write us a special memorandum such as we can keep always before us. We would understand that in giving you a limit it would be for assortments in same proportion of A. B. C. or 1. 2. 3. 4., as in your sample shipment, or if not in same assortment, this to be taken into account in executing our orders. The jute to be invoiced at one price, the rejections and cuttings at separate prices."

Plaintiffs to defendant, 18th December 1865:

"With the cuttings per *Belle Isle* we have not yet done anything there not having been much demand for such goods of late. We think it may perhaps be best to let them arrive, as cuttings ought to be favorably affected by the high prices current for jute; but we shall be guided, as to this by the course of events, and in any case you may depend on our doing for the best according to our judgment. We have now the pleasure to acknowledge receipt of your valued favors of the 2nd and 8th November, the contents whereof have had our best care: the enclosures referred to in these letters we have found in order."

Plaintiffs to defendant, 26th December 1865:

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"We enclose duplicate of our last respects, which bore date 18th instant, and referring to our communications thereby, we have now to acknowledge receipt of your valued favor of 22nd ultimo, the contents whereof have had our best attention. We thank you for the invoice of jute per *Maldon* handed us thereby, and your draft for amount of same has met with due protection. The *Maldon* is not such a good ship as we should like to see you shipping by, and in future when sending us goods such as jute, which are insured free from average, we would rather you gave an extra 5s. or 7s. 6d. per ton freight to a fine iron or other really, first-class ship, even if by doing so you should have slightly to exceed our limit. . . . It would be very useful to us to receive from you along with advice of shipment or shipping documents, a report of your own as to the quality and color of the jute, saying how in these points it compares with the (A) per *Victory*, and we beg you kindly to keep this in mind in future. . . . On the 19th instant we sent you the telegram of which copy is enclosed, giving you order for 1,000 bales cuttings at £6-5, 2,000 bales cuttings at £6, and 1,000 bales rejections at £11-10 per ton. We confirm this message, and trust we shall soon have advice from you of further operations for our account. Please kindly keep us carefully advised of the news you get regarding the extent of this season's supply. That is the most important point of all as regards the course of the market for the article. With reference to our remarks about shipping by fine vessels, they do not apply so much to rejections, and to cuttings not at all, for a difference of freight of 5s. per ton would cover the allowance for a good quantity of damaged in a parcel of Calcutta tallow. We are glad to see you have hopes of pushing a regular business. . . . The market for the article here is dull and cheaper, and we do not care to extend our limit meantime till we have seen the quality of the first shipment."

Plaintiffs to defendant, 10th January 1866:

"Yesterday we accepted a draft of yours for £227-6, dated December 6th, of which we have received no advice from you. In the body of the bill it is stated to be against 652 bales jute cuttings by the *Elphinstone*, and presuming that this is part of the shipment which your telegram, acknowledged by us on the 18th ultimo, told us you were making, we have not hesitated to accept this draft, though without advice of it. It is, however, always more satisfactory to have advice of bills before being called upon to accept them, and we hope that in

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future you will give us prompt advice of your drafts, so that we may have the same at least as soon as the presentation of the bills. . . . Being anxious to know what you were doing for us, we sent you on the 8th instant the telegram of which copy is enclosed, and which we now confirm. By it we asked you when telegraphing to us to quote price for cotton of fair quality, inclusive of cost and freight, a request with which you will no doubt comply. As usual at the end of the year, we hand you enclosed statement of your account with us, showing a balance at your debit of £293-13-10, which we doubt not you will find correct, and for which we hope soon to receive a remittance from you. The jute sales to-day have gone very dull, and prices, too, lower than the private business done recently. The *Etna* has just finished discharging jute and cuttings. We have not seen them yet, but there is a deal of damaged. Decidedly we would wish you in future, as far as possible to ship by first-class iron vessels, as the saving on damage makes up for difference in freight."

Defendant to plaintiffs, 22nd January 1866:

"We now hand you the following invoices, viz., 998 bales jute, 128 bales rejections, 38 bales cuttings per *Matooka*, and 500 bales cuttings (from Argenti, Schilizzi and Co.), for equivalent of which we have valued on you for £1,836. This rise in the exchange, and freight of £2-5, which we did not think we should have had to pay, makes the above parcels stand as follows, viz., 998 bales at £14-5, 128 bales at £11-3, 38 bales at £6-11, and 500 bales at £7-12. We do not, however, anticipate other than the best results for the shipment. Regarding the 500 bales cuttings, if from any cause you do not desire to have them, be so good as to treat the parcel as a consignment."

Plaintiffs to defendant, 26th January 1866:

"We enclose duplicate of our last respects, dated 10th instant. On the 20th instant, we received your telegram of 9th instant as follows: 'Repeat telegram of 12th. Executed one thousand, thirteen ten; two thousand cuttings, six ten; one hundred rejections, eleven twelve. Increase limit one-fourth, jute rising fast.' We did not repeat our message on 12th December, because our letter of the 18th idem, by which we confirmed it, would be with you by the time your telegram was delivered to us. From the other part of your message we understand that you have bought against our orders 1,000 bales unsorted jute at £13-10 per ton, cost and freight; 2,000 cuttings at £6-10, and freight; and 100 rejections at £11-12. If these prices were correctly transmitted, they

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are £2 per ton above our outside limit for rejections, and £5 above our outside limit for cuttings, the latter being too much on such a low-priced article. We will not further comment on this purchase in the meantime, but shall await your letter by which you confirm your above message, when we shall return to this subject again.

"We have further to acknowledge receipt of your valued letters of 8th and 22nd December, the contents of both of which have had our best attention. From the first we unfolded invoice of the 652 bales jute cuttings per *Elphinstone*, your draft against which for £227-6 we told you by our last we had accepted without advice. We have made note of what you say about the cost of this shipment exceeding our limit; we find that it does so by £14-10 per ton, too much, we fear, to be made up by the lower cost of the balance of the order. We shall see as to this, however, when the documents thereof come forward. Meantime, we must say that if the order as a whole is executed in excess of our limit, and if it results in a loss on the invoice cost (which, however, we scarcely think it is likely to do), we reserve our right of coming back upon you for such loss. We enclose copy of the figures by which we establish the cost of this shipment by the *Elphinstone*. . . .

Pray accept our thanks for the remittance of £40 handed us by your favor of 22nd ultimo; we give you stamped receipt for same enclosed. We take note of the jute and cuttings which you say you have ready for us, and are glad to observe that you speak well of the quality of same; we suppose your next will bring us advice of further shipments. Referring to what we have written you as to goods sent forward over our limits, we feel sure you have acted for the best, and where the difference is trifling we would say nothing, but when it is £12, as in case of cuttings per *Elphinstone*, you will not consider it unreasonable our making a reserve that we must look to you in the event of an actual loss being incurred, but we shall make no reclamations if we can help it, and don't think any will be necessary."

Defendant to plaintiffs, 8th February 1866:

"We have now the pleasure to hand you the following invoices, viz.:— 322 bales rejections and 750 bales cuttings per *Matooka*, for equivalent of which and of jute per *Sir John Lawrence* we have valued on you £1,150-14-8, and request your usual protection of the drafts. The local demand for jute cuttings is proceeding at such a price, that from Rs. 2-6 per bale they have advanced to Rs. 4-8, and will ere long move higher, and this notwithstanding that the inferior quality of this year's

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crop has led to an increase of cuttings, so that we hope you will have held, and will hold all you can for the high prices that must soon rule with you; we shall telegraph to you to-morrow, 'cuttings rupees 4-8 per bale, rising, hold.'

Defendant to plaintiffs, 22nd February 1866 :

"In completion of our shipments per *Matooka*, please find invoice of 19 bales rejections and 248 bales cuttings, for which we have valued on you £102-12-3. "Jute cuttings continue at Rs. 4-8 to 5 per bale, having risen from Rs. 2-6 per bale, the price of our later shipments."

Defendant to plaintiffs, 8th March 1866 :

"In all cases in which circumstances beyond our control oblige us to exceed your limits in the execution of orders, we shall be obliged by your intimating to us, as soon as you are in possession of such a fact, your decision whether to take the parcel over at invoice cost, or to treat it as a consignment on our account and risk; we believe this is the usual practice, and very reasonable it is. We now enclose invoice per *Stratton Audley* of 183 bales of jute. This small parcel is an instalment of the 5,000 bales order."

Plaintiffs to defendant, 10th March 1866 :

"We have your letter of the 22nd January. The enclosures specified therein we found in order, but we regret to say that the cost of the 500 bales is so much in excess of our limits that we shall not be able to take them to account. Had the excess been a trifling one, we would have said nothing about it; but when it comes to be about 20 or 25 per cent. it is too much, and we must here confirm what we wrote in our last about your conforming yourselves, when executing orders for us, as closely as possible to the limits we give you. The 500 bales cuttings referred to we shall treat as a consignment, and in due time render you account sales. Meantime, without prejudice to us so far as they are concerned, we have accepted your drafts for £1,836."

Plaintiffs to defendant, 19th March 1866 :

"We have yours of the 8th ultimo. We thank you for the enclosures unfolded from your letter; the draft advised by it has already met with the needful protection. The rejections cost somewhat over our limits, but we pass your invoices so far as they are concerned. The cuttings, however, again so far exceed our limit that we must decline accepting them as for our account, and shall therefore treat them as a consignment, making the best results we can out of them, and tendering account sales

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to you in due time. We notice your remarks regarding cuttings and the probability of their commanding high prices by-and-by; we do not see any reason for forcing sales of the articles, but at the same time there is a large stock on spot and afloat which will take a considerable time to work up, and the market is exceedingly dull at the present time. We have yours of the 22nd February, and thank you for the invoices handed us thereby. That of the 248 bales cuttings again shows a cost so much in excess of our limits that we are obliged to decline these cuttings also, and shall therefore treat them as a consignment and in due time account to you for the proceeds. We hope the market for the article may improve so as to enable us to realize cost for you. Meantime we have accorded the needful protection to your draft for £102-12-3."

plaintiffs to defendant, 26th April 1866 :

"We have your letters of 8th and 22nd March; the first brought us invoice of 183 bales common unsorted jute per *Stratton Audley*; 183 bales cost somewhat over our limit; we will accept them, and have done the needful to your draft. Your letter of the 22nd March brought us invoice of rejections by the *Stratton Audley* and *Riversdale*, and advised your draft against them for £353-13-9. The excess of the cost of these rejections over our limits surprises us, and makes it of course impossible for us to take them to account. We shall therefore receive them as a consignment from you, and in the meantime we have accepted your draft against them to your debit. Referring to what you say at the beginning of your letter of the 8th March about our giving you prompt intimation as to whether or not we accept for our own account any shipment you make against our orders costing over our limits, we beg to reply that we have always done so, with the exception of the *Elphinstone* cuttings, and our reason for not doing so in that case was because you had told us that the excess in their cost would be rectified by later shipments; but when we saw that shipment after shipment showed a cost in excess of our limits, we have told you at once that we could not receive them otherwise than as consignments. We can easily understand that, owing to some unanticipated change in the exchange, or disappointment with a freight engagement, it may be impossible to avoid exceeding limits by a few shillings now and again; but it becomes a different matter when the excess comes to 20 per cent., as is the case in the rejections last invoiced by you, and in order to save disappointment, we think it well here frankly to tell you that we reserve the right of

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refusing to accept, even as consignments, shipments the cost of which so out of all proportion exceeds our limits (say when difference exceeds 5 to 7½ per cent."

NORMAN, J.—The plaintiffs, Messrs. Robinson and Fleming, of Austin Friars in London, sue to recover Rs. 12,011-6 as being due from the defendant to them in respect of bills drawn by the defendant upon the plaintiffs against shipments of jute and accepted and paid by the plaintiffs.

The first question raised by the defendant was whether the plaintiffs had proved the payment of the bills. The defendant admitted on cross-examination that he had sold the bills for cash and received the money.

The plaintiffs produced the bills: one of them, the receipt proved to be in the handwriting of the cashier of the Chartered Mercantile Bank; two of them were endorsed by agents received for the Central Bank of, Western India, (signed by Robert Davidson, and the other by David Davidson, in London.) The handwriting of Mr. Davidson was proved, and the fact that they were agents of the Central Bank. A fourth endorsed in blank by the Central Bank of Western India bears an endorsement, "Received from the London and County Bank, R. Nicholas." No evidence was given to show who Mr. Nicholas was. Three other bills bear simply a blank endorsement of "Central Bank." But as they are produced by the acceptor long after the due date, and the defendant, the drawer, admits that though he endorsed and negotiated them he received no notice of dishonor, and that no demand for payment of the bills was ever made on him, I think it is abundantly proved that the bills must have been paid at or before maturity by the plaintiffs as acceptors.

The defendant consigned to the plaintiffs 657 bales of jute cuttings by the *Belle Isle*. A portion of this shipment, viz., 575 bales of cuttings, he described as a consignment on account and risk of Messrs. Stevens and Foggo. But he drew in his own name against the entire consignment, without distinguishing the goods on account and risk of Stevens and Foggo. I think it is proved that the plaintiffs in this transaction were dealing

with the defendant alone, and giving credit to him, and not to Stevens and Foggo. A perusal of the correspondence confirms me in that conviction. The result is that, in my opinion, the plaintiffs in paying the bill drawn against this shipment paid the money to the use of the defendant and are entitled to look to him for repayment.

(His Lordship read a great deal of the correspondence between the parties, to show the nature of the arrangement and transactions between them. He referred especially to the plaintiffs' letters of December 26th, 1865, January 10th, 1866, and January 26th, 1866, the defendant's letter of January 22nd, 1866, the plaintiffs' of March 10th, the defendant's of February 8th, the plaintiffs' of March 19th, the defendant's of February 22nd, the plaintiffs' of April 3rd, the defendant's of March 8th, and continuing.

The plaintiffs have proved payments under the bills drawn against such shipments, amounting to the sum of £964-3-6, in excess of the amount for which they give credit to the defendant as being the net proceeds of the sale of jute, jute cuttings, and rejections, which, under the foregoing circumstances, they were entitled to treat, and have in fact treated, as consignments on account of the defendant. Mr. Branson, for the defendant, has attempted to show that some of these consignments were at a cost within the limits, but without success. He attempted to show that the plaintiffs did not give notice in proper time to the defendant that they would treat the invoices as consignments. But on looking carefully to the particulars as to the arrival and departure of mails, and to the fact that down to a period after the 7th April 1866, which is a very important date with reference to this question, the defendant, as appears from a letter of the plaintiffs of the 10th of March 1866, was in the habit of sending the letters including the invoices of his shipments by the mail conveyed by the Peninsular and Oriental Company's steam ship from Calcutta, while the bills drawn against such shipments transmitted by the bankers used to come forward by the Bombay mail, it appears pretty clearly that the plaintiffs did in most instances reply by return of post after receiving the invoices. In the only cases in which there was apparently some slight un-

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explained delay, there appears to me to be nothing to warrant any inference that the plaintiffs intended to adopt the shipments at a cost considerably exceeding the limits to which they had repeatedly told the defendant he must strictly confine himself.

In addition to the sum of £964-3-6, there is a sum of £188-5-6, the balance of an old account.

The defendant contended that the suit as to this sum was barred by limitation. But this objection fails. The debt has been distinctly admitted by the defendant in the correspondence which has been put in by the plaintiffs. A letter dated the 22nd of December 1865, written three years before the commencement of this suit, which was instituted on the 17th of November 1868 contains a distinct admission of the defendant's liabilities on the old account.

The plaintiffs are therefore entitled to a decree for the equivalent of £1,052-9-0, being the aggregate of the two sums of £964-3-6, and £188-5-6, at the exchange of the day for bills on demand, 1s. 11, $\frac{7}{8}$ with interest at 6 per cent. from the date of the plaint. The plaintiffs will recover their costs on scale 2.

From this decision the defendant appealed on (*inter alia*) the following grounds :—That there was not sufficient legal evidence to sustain the suit ; that the letters of the plaintiffs should not have been held to be stated or settled or final accounts as between him and the plaintiffs ; that on the average of the whole number of purchases they did not exceed the limits fixed by the plaintiffs that even if there had been an excess proved, the defendant was only liable to be debited with the amount of such excess, and that it was not competent for plaintiffs at their option without the ratification of the said defendant, to treat the agency shipments as consignments ; that the portion of the plaintiffs' demand in this case *viz.*, £188-5-6, being the balance of an old account, was barred by the Law of Limitation, and that no evidence should have been allowed to be given as to the said old account or balance thereon of £188-5-6, inasmuch as the plaint confines all causes of action and demands thereunder to the time between the 31st December 1865 and 31st December 1867 ; that there was no evidence of the several bills of exchange in the plaint and

pleadings mentioned having been paid by the plaintiffs; and that the plaintiffs were not entitled to treat the various rejected shipments as consignments of and from the defendant, but as shipments made on account of the plaintiffs and by their orders.

Mr *Kennedy*, for the appellant, contended as to the £188-5-6 that it was barred by the Law of Limitation. Part payment is not sufficient acknowledgment of debt—*Gora Chand Dutt v. Lokenath Dutt* (1); and this writing is not sufficient under section 4, Act XIV of 1859—*Khwaja Muhammad Janula v. Venkatarayar* (2). The sufficiency of a writing as an acknowledgment is to be judged of by the Court—*Kristna Row v. Hachapa Sugapa* (3). [PHEAR, J., refers to *Umesh Chandra Mookerjee v. E. Sageman* (4)]—*Luchmun Pershad v. Rum-*

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(1) 8 W. R., 324.

(2) 2 Mad. H. 6, 79.

(3) *Id.*, 307.

(4) Before Sir Barnes Peacock, Kt., Chief Justice and Mr. Justice Macpherson.
UMESH CHANDRA MOOKERJEE
(DEFENDANT) v. E. SAGEMAN (PLAIN-
TIF.)

13th April 1869.

THIS was an appeal from a decision of Mr. Justice Phear. The suit was brought on a promissory note, dated 1st April 1865, by which the defendant promised to pay the sum of rupees 1,000 to the plaintiff, with interest at the rate of 12 per cent. per annum for value received. The defendant on 18th of July 1866 wrote a letter to the plaintiff, which contained the following words:—"I further hold myself responsible to you for the two sums of rupees 1,000 and rupees 900, respectively the latter sum bearing interest at the rate of 24 per cent. per annum. Both these sums of rupees 1,000 and rupees 900 I engage to pay to you, with interest on the latter as soon as practicable.

At the original hearing, the defendant raised the defence that the suit was barred by the Law of Limitation, but PHEAR, J., held that the letter of 18th July 1866

was an admission of the debt, and the defendant failing on the merits, a decree was given for the plaintiff for rupees 1,000, with interest as in the promissory note.

The defendant appealed from this decision.

Mr. Branson for the appellant.

Mr. Kennedy and Mr. Evans for the respondent.

PEACOCK, C. J. (after shortly stating the facts), continued:—"It appears to me that this decree ought to be affirmed. The letter is addressed to Mrs. White, but parol evidence was admissible to shew that Mrs. Sageman was known as Mrs. White, and that this letter was given to her. There if an acknowledgment of two debts. It is almost impossible for an acknowledgment in writing so to identify a debt, as that no parol evidence is required for the purpose of completing the identification.

In a case under the Statute of Frauds, it was held that, if a letter properly signed does not contain the whole agreement, yet if it actually refers to a writing that does, it will be sufficient, though the latter writing is not signed; and parol evidence is admissible to identify the writing

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san Ali (1) As to the evidence of payment of the bills—

referred to—*Allan v. Bennet* (a), Roscoe's Nisi Prius Evidence, 11th Ed., 152.

Now, if parol evidence is admissible in such a case to identify the writing referred to, it appears to me to follow that parol evidence is admissible in this case to identify the debt referred to. Suppose the defendant had said in the letter, "I acknowledge that I owe you £1,000, for which I have given a promissory note," that of itself would not identify the promissory note referred to. Even if he said, "I have given you a promissory note of the '1st February 1865,' that would not of itself identify the note; but some evidence would be required to shew that this particular note was the note to which the acknowledgment referred. Parol evidence is admissible for the purpose of showing parcel or no parcel. Thus, where a testator devised all his farm, called "Trogues Farm," it was held that it might be shown of what parcels the farm consisted to show what were the particular lands to which the writing referred as "Trogues Farm;" see *Goodtitle v. Southern* (b), Roscoe's Nisi Prius Evidence, 10th Ed., 25. It appears to me therefore that parol evidence was admissible for the purpose of showing what debt was referred to in the acknowledgment; and the plaintiff proves that the debt of rupees 1,000 is the debt referred to. It is then said that the plaintiff on cross-examination admitted that there were three debts, and that the acknowledgment might as well have referred to the third debt, as to the other two debts of which she speaks. No doubt, an ambiguity was created, as the defendant promised to pay only two debts, and there were three debts spoken to by the plaintiff. The question then arose as to which two of the three the acknowledgment related to. But how was that ambiguity created? Not by the writing, but by the parol evidence of the plaintiff obtained from her on cross-examina-

tion. It is a clear rule of law that parol evidence is admissible to explain a latent ambiguity, that is, an ambiguity raised by evidence. No ambiguity arose upon the face of the acknowledgment, until the parol evidence showed that there were three debts. "When an ambiguity not apparent on the face of a written instrument is raised by the introduction of parol evidence the same description of evidence, is admitted to explain it; for example, where a testator devised his estate called Blackacre, and had two estates called Blackacre, evidence was admitted to show which of the Blackacres was meant. So, when a man devises an estate to his son, John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended."—*Roscoe's Nisi Prius Evidence*, 10th Ed., 23. It therefore appears to me that the evidence was admissible for the purpose of showing that the acknowledgment related to the promissory note upon which the action was brought, and to prove that Mrs. Sageman was the person alluded to under the name of Mrs. White, and that she was the person to whom the note was given.

I might further illustrate the case thus. Suppose there were two notes of £1,000 each, one of April 1st, 1865, and one of April 2nd, 1865, and that the one of April 1st had a surety to it; and suppose the defendant said in his letter, "I acknowledge I owe you £1,000 on my note of April last." I apprehend it is clear that the plaintiff could show, by parol evidence, that the acknowledgment referred to the note to which there was no surety. It is further said that there was no acknowledgment to pay interest, and that the Judge has given too much interest. If the defendant acknowledged that he owed money on the note, the interest would run from that date at the latest. It may be that the Judge has given interest from the date of the note, and that he has given a

(a) 3 Taunt., 169

(1) 8 W. R., 513,

(b) 1 M. & S., 299.

Pfiel v. Vanbatenberg (1), and the admissibility of the letters—*Smith v. Blakey* (2).

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Mr. *Phillips* on same side.—The plaintiffs had no power to sell contrary to orders—*Smart v. Sandars* (3) and *Brown v. McGran* (4). No confirmation was given to the transaction by defendant's letters—Story on Agency, 86; *Raleigh v. Atkinson* (5). They must therefore be taken to have accented and sold the parcels on their own account. [PHEAR, J., refers to *Inman v. Clare* (6)]. As to want of evidence of payment—*Phillips v. Warren* (7). The receipt is no evidence of payment by the acceptor.

Mr. *Evans* (with him Mr. *Marsden*) for the respondents.—The case of *Pfiel v. Vanbatenberg* (1) decides that a bill having got back into the acceptor's hands must be presumed to have been paid. It is sufficient evidence of payment for the acceptor to produce the bills—*Gibbon v. Featherstonhaugh* (8). Possession is evidence of payment—*Brembridge v. Osborne* (9). Production of letter of request to return cloth was held *prima facie* evidence of its having been returned—*Shepherd v. Currie* (10), Roscoe on Evidence, 35; *Mountford v. Harper* (11), *Egg v. Barnett* (12). The account sales are *prima facie* evidence of the amount realized—*Shaik Domun v. Stevens* (13) *Hodgson v. Rupchand Hazarimal* (14). The defendant did not object before—*Sherman v. Sherman* (15). Remission to old account shows there is an account against the appellant, and is a sufficient

little too much. But there is no appeal (3) 5 O. B., 895.
 on that point; and as no substantial in- (4) 14 Peters' Rep., 480.
 justice has been caused to the defendant, (5) 6 M. & W., 670.
 I should be reluctant to reverse the deci- (6) John's Ch. Rep., 769.
 sion as to the excess. Under these circum- (7) 14 M. & W., 379.
 stances the decree is affirmed with costs. (8) 1 Starkie, 225.

MACPHERSON, J.—I also think that (9) *Id.*, 374.
 the decree should be affirmed with costs. (10) *Id.*, 454.
 There was a direct acknowledgment of (11) 16 M. & W., 825.
 a debt; and parol evidence was admis- (12) 3 Esp., 196.
 sible for the purpose of identification. (13) 2 Ind. Jur., N. S., 5.
 (14) 6 Bom. H. C., O. C., 39.
 (15) 2 Vernon, 276.

(1) 2 Camp., 439.

(2) 8 B. & S., 157.

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acknowledgment to prevent limitation. It is not necessary that the amount of the debt should be stated—*In re Kenney's Estate*, Phear J., April 12th 1869 (1). Where an acknowledgment of debt was held sufficient without stating the amount, a direct admission is not required—*Kristna Row v. Hackapa Sujapa* (2), *Nizamudin v. Mahanmad Ali* (3).

Mr. *Kennedy* in reply.—There is nothing to show that the money was paid on any account whatever. The words “remittance to old account” are not an admission of any debt. Unless the bills come from the possession of the proper person they are no evidence of payment.

COUCH, C. J.—We are of opinion that there was sufficient evidence of the payment of the bills by the plaintiffs. There is no question that the bills were drawn against the consignments, and the defendant in his evidence said, “I got the proceeds of the bills drawn against the shipments, which bills I sold to banks; no demand has been made on me as the drawer of those bills; I have received no notice of the dishonor of those bills.” It the bills had been refused acceptance, and the plaintiffs after signing their names as acceptors had cancelled the signatures and kept the bills in their possession, as it has been suggested by the defendant’s counsel might have been done, the defendant must in the ordinary course of things have received notice of the dishonor, or some demand would have been made upon him by the banks. If the goods had been sold by or on account of the holders of the bills in consequence of the non-acceptance of them, the defendant must have had some notice of it. The correspondence shows, and the fact cannot be doubted, that the goods were sold by the plaintiffs, which they could not have done if they had not accepted the bills. The fair inference from the facts proved, and the production of the bills by the plaintiffs at the hearing is, that the bills were accepted and returned to the indorsees, and were afterwards paid by the plaintiffs.

(1) See Broughton’s Civil Procedure (2) 2 Mad. H. C., 307.
Code, 3rd Edition, Appendix, 222. (3) 4 Mad H. C., 385.

We also think that the plaintiffs were right in their contention, that, in determining whether they were entitled to treat the goods as a consignment, each invoice was to be taken separately.

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(His Lordship here read some portions of the correspondence to show this was the intention of the parties in the arrangement. He referred to the plaintiffs' letters of March 19th, and April 3rd, 1866, remarking of the latter: "There was here a clear intention that each invoice would be taken separately, and there is no remark or remonstrance from the defendant that this was not what he intended." He referred also to the defendant's letter of March 8th, the defendant's letter of January 26th, 1866, the plaintiffs' of April 26th, and continued.) In the case of the *Elphinstone* cuttings, the plaintiffs made a concession to which the defendant was not entitled, and it does not show what was the general agreement. The case now put forward by the defendant is at variance with the letters which passed between the parties at the time of the transactions, and it is from these letters that we can most safely collect what was the understanding between them. The next matter we have to consider is the shipments by the *Ganges* and *Belle Isle*, and the question between the parties as to these is disposed of by a reference to the correspondence. In his letter of 23rd September 1865, the defendant advises the shipment of 668 bales of jute cuttings which was made on his own account. On the 3rd of November, the plaintiffs wrote to the defendant asking whether they might take the shipment by the *Ganges* on their own account, which was assented to by letter of 23rd December. On the 18th December, the plaintiffs wrote to the defendant: "With the cuttings per *Belle Isle* we have not yet done anything, there not having been much demand for such goods of late. We think it may perhaps be best to let them arrive, as cuttings ought to be favorably affected by the right prices for jute; but we shall be guided as to this by the course of events, and in any case you may depend upon our doing for the best according to our judgment." This letter, which must have been received after the defendant had assented to the plaintiffs taking the shipment by the *Ganges* on their own account, tells him they do not intend to do so with the shipment by the *Belle Isle*, and the

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defendant made no reply claiming that they should do so. His assent with regard to the *Ganges* shipment had no such qualification annexed to it as he now sets up. Even if we thought it fair that the plaintiffs should take on their own account the shipment by the *Belle Isle*, we are not at liberty to make an agreement for them, and we are of opinion that the plaintiffs were not bound to treat Messrs. Stevens and Foggo as their principals. The defendant himself drew for the whole amount of the invoice, making no distinction between his own goods and theirs, and the plaintiffs having paid the bill are entitled to sue him for the deficiency.

We also think the account sales are *prima facie* evidence, and that the plaintiffs are entitled to recover what upon the footing of them is the balance due in respect of their advances ; for assuming that the plaintiffs received instructions from the defendant relative to holding the goods which they were bound to follow (with regard to which we give no opinion), there is no evidence that if the sales had been made at later dates than they were, better prices would have been realized.

It only remains to consider the question of the law of limitation. In order to take the item of £188-5-6 out of the operation of that law, the plaintiffs rely upon the postscript in a letter of the 22nd December 1865—"Enclosed a remittance of £40 to old account." The terms of section 4 of Act XIV of 1859 require that the person shall have admitted that the debt is due by an acknowledgment in writing signed by him. Although the amount need not be stated, and evidence may be given to identify the debt referred to, the writing must contain an admission that a debt is due. The words "remittance of £40 to old account" are ambiguous, and do not necessarily import that a further sum is admitted to be due. And even if we look at the surrounding circumstances, which are that there was an account between the parties upon which a larger balance than £40 was due, we think we are not justified in holding that the words were intended as an admission that more was due. The words must be regarded rather as a mere direction accompanying the remittance than as an acknowledgment in writing of a debt, and we are of opinion that they are not sufficient to give a new period of limitation.

The decree must therefore be modified, by deducting from the sum thereby ordered to be paid, equivalent of the sum of £188-5-6, at the exchange of 1s. 11 7/16d., and each party must bear his own costs of this appeal.

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Decree modified.

Attorney for the appellant : Mr. Carapiet.

Attorneys for the respondent : Messrs. *Barnes and Co.*

Before Mr. Justice Norman.

SRIMATI JAGADAMBA DASÍ v. J. M. GROB AND ANOTHER.

Guarantee—Statute of Frauds 29 Car. II, c. 3, s. 4—21 Geo. III., c. 63, s. 17.

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June 9.

A contract of guarantee is a "matter of contract and dealing" within the terms of section 4 of 21 Geo. III., c. 63, and therefore such a contract made by a Hindu is not affected by section 4 of the Statute of Frauds. When a defendant raises a claim of set-off, on the trial of that issue he must be considered as plaintiff.

THE plaintiff, as widow and executrix of Lalchand, who served the defendants as banian from 1st December 1866 till April 1867, sued the defendants to recover rupees 22,040 as the balance due to him in respect of the banianship account. The defendants admitted a debt to Lalchand, and agreed to the accounts being taken, but they sought to set off against the plaintiff's claim a corresponding amount due to them, as they alleged, under Lalchand's guarantee. His sons had previously served the defendants as banians, and the defendants alleged that Lalchand had guaranteed their debts. The guarantee sought to be set off was a verbal guarantee.

The Advocate-General (offg.) Mr. *Evans* with him) for the plaintiff, contended (*inter alia*) that the defendants must fail, as the alleged guarantee was not in writing. The 4th section of the Statute of Frauds is applicable to this case. The defendants come under English law and the law of the defendants must determine the case—21 Geo. III., c. 70, s. 17. This has been held with reference to a case in the mofussil—*Muttiya Pillai v. Western* (1). Even if this decision is wrong, the 4th

(1) 1 Mad. H. C. Rep., 27.

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section of the Statute of Frauds is applicable in any case as being part of the procedure of the Court; and as that section enacts that "no action shall be brought," this suit is not maintainable—*Leroux v. Brown* (1). The case of *Borrodaile v. Chainsook Buxyram* (2) only decided that the 17th section did not apply. The question was raised in *Ramsagur Dutt v. Nobogopaul Mookerjee* (3), but does not appear to have been decided, Section 4 stands in the same position as the old Law of Limitation, 21 Jac. L., c. 16, which was held to apply as part of the law of procedure to Hindus and Mahomedan, as well as Europeans in the Supreme Court—*Ruckmaboye v. Lulloobhoy Mottichund* (4). In *Williams v. Wheeler* (5), the case of *Leroux v. Brown* (1), though doubted, was held to be law. If section 4 is part of the procedure of the Court, neither 21 Geo. III., c. 70, s. 17, nor 37 Geo. III., c. 142, s. 15, had any effect so as to make it not applicable.

Mr. Cowell (Mr. Goodeve with him), for the defendants, was not called upon.

NORMAN, J.—In this case there are two issues: first, what is the amount due to Messrs. Grob & Co. on the banianship account of Rajkrishna Mitter & Co., as between the defendant and the plaintiff as representing Lalchand Mitter. This question has been disposed of, and the exact state of the account will be ascertained by reference to Baboo Kadarnath Bose; secondly, did Lalchand guarantee to the defendants, Messrs. Grob & Co., the payment of the amount of that account? The alleged guarantee is not in writing; that which the defendant seeks to prove is an agreement by word of month. (His Lordship held that Lalchand did guarantee the debt, and continued.) An ingenious point of law has been raised by the Advocate-General on the 4th section of the Statute of Frauds, which enacts that "no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default, or

(1) 12 C. B., 801.

(3) Bourke's Rep., 367.

(2) 1 Ind. Jur., O. S., 70; S. C., 1. (4) 5 Moore's I. A., 234.
Hyde, 51.

(5) 8 C. B., N. S., 316.

“ miscarriage of another person, &c, unless the agreement upon
 “ which such action shall be brought, or some memorandum or
 “ note thereof shall be in writing, and signed by the party to be
 “ charged therewith, or some other person thereunto by him law-
 “ fully authorized.” The Advocate-General argued that this is
 not so much a law relating to contracts as a law of the forum
 regulating the procedure of the Court, and he referred to *Lerouz*
v. Brown (1), in which it was held that a verbal contract made in
 a foreign country cannot be enforced in a Court of law in Eng-
 land if required under the 4th section to be in writing. The
 decision is certainly a very startling one that a contract, valid
 and binding, according to the law of the place where it was made,
 shall be treated by an English Court as of no force, because the
 parties making it have not observed certain formalities required
 by English law of the requirements of which at the time of mak-
 ing the contract, the parties might have had no means of inform-
 ing themselves. I think that no lawyer can read the judgment
 in that case without surprise. Its correctness has been ques-
 tioned, but it never has been overruled. But whether that case
 be law or not, it does not govern that now before me. The
 statute 21 Geo. III., c. 70, s. 17, provides that “ the Su-
 “ preme Court shall have full power and authority to hear and
 “ determine in such manner as is provided for that purpose the
 “ Character of Letters Patent and all manner of suits against the
 “ inhabitants of the city of Calcutta, provided that at their inherit-
 “ ance and succession to land, rents, and goods, and all matters
 “ of contract and dealing between party and party shall be de-
 “ termined, in the case of Mahomedans, by the laws and usages
 “ of Mahomedans ; and in the case of Gentus, by the laws and
 “ usages of Gentus ; and where only one of the parties shall be a
 “ Mahomedan or Gentu, by the laws and usages of the defend-
 “ ant.” Now I have no doubt that a contract of guarantee is a
 matter of contract and dealing, and therefore the validity of it,
 and the decision or determination of this Court, must be, in the
 case of Hindus, according to the laws and usages of Hindus.
 The Advocate-General raised a second point on the construction

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of the 2nd clause of the 17th section of 21 Geo. III., c. 70, that, where only one of the parties is a Hindu, the case must be determined according to the laws and usages of the defendant. I think that the 1st clause is quite general; matters of contract and dealing between party and party, in the case of Gentus, are to be determined by the laws and usages of Gentus. The 2nd clause does not appear to me to limit the operation of the first. It is merely intended to make it clear that no person shall be made liable on a contract, except according to his own, whether it be Mahomedan or Hindu laws. However that may be, in another view of the section in question, the present case would fall within the 2nd clause. Messrs. Grob & Co. seek to set off a debt alleged to be due to them from the estate of Lalchand. Mr. Grob is an actor; and Jagadamba, for the purposes of this issue, must be treated as a defendant, and exactly in the same position as if there were two cross-actions, in one of which she was defendant. I am of opinion that the contract of guarantee may be proved, though not in writing as required by the 4th section of the Statute of Frauds. I am satisfied it has been proved, and, subject to the enquiry as to the amount due to the defendant, the rupees 28,000 may be set off.

Judgment for plaintiff.

Attorney for the plaintiff : Mr. Hart.

Attorneys for the defendant : Messrs. Judge and Gangooly.

Note.—The plaintiff appealed. The memorandum of appeal was filed before the decision in *Nekram Jemadar v. Insariprasad Pachuri* (1), but the appeal was not heard until after that decision. It was argued before Couch, C. J., and Markby, J.

tended that the 4th section of the Statute of Frauds was part of the procedure of the Court and applied to the present case. The question was not noticed in the judgment of the Court which reversed the decision of Norman, J., on the ground that no sort of contract of guarantee had been proved by the evidence.

Mr. Woodroffe, for the appellant, con-

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

NEKRAM JEMADAR v. ISWARIPRASAD PACHURI.

Statute of Frauds, 29 Car. II., c. 3, s. 4—21 Geo. III., c. 70, s. 17—Hindu Defendant.

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July 6.

The 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu.

THIS was a case referred for the opinion of the High Court, by the first Judge of the Small Cause Court, under section 55 of Act IX of 1850.

The case was stated as follows by the Judge on referring it :—

“ The plaintiff sued the defendant for rupees 266-5-6 on the following cause of action :— ‘ For that you became surety to the plaintiff for one Ratiram Upadhya, and induced the plaintiff to receive him in employ on the guarantee of such suretyship ; and that the said Ratiram Upadhya has not accounted for certain moneys which he had collected in the ordinary course of his duties, whereby the plaintiff has sustained damages to the amount stated.’

“ The pleas were these :—

Non assumpsit.

Never indebted.

“ The evidence of the plaintiff himself was that he, the plaintiff, was jemadar of durwans at the Bonded Warehouse, and was security for all the durwans, and appointed them all ; that Ratiram was one of those durwans, and had embezzled the sum of rupees 315-10-6 ; that the plaintiff had been induced nearly four years ago to appoint Ratiram at the request of the defendant, whose nephew Ratiram was, and on an undertaking by the defendant which was in the following terms, *viz.* :— ‘ If you suffer any loss by his negligence, or if any money be missing, I will pay ;’ but that this undertaking or agreement was not in writing, nor had any written memorandum or note of it been signed by the defendant or any agent of his or him taken by any one.

“ I took no further evidence, as Mr. Moodie, counsel for the defendant, contended that the case must be dismissed, under the

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4th section of the Statute of Frauds, and I was inclined to agree with him, on the principle laid down in *Ieroux v. Brown* (1). I considered that, under section 17, statute 21 Geo. III., c. 70, the Hindu law in matters of contract and dealing was the *lex loci* of Calcutta, and as such regulated the substantive law applicable to this case; but that the 4th section of the Statute of Frauds (differing in this respect from the 17th section, which relates to the validity of the contract, and not to the mode in which it shall be proved, and which has been held, the case of *Borrodaile v. Chainsook Buxyram* (2), not to apply to suits against Hindu defendants) was the *lex fori*, and as such regulated the mode in which suits such as the present should be prosecuted, and the conditions on which they should be heard. I had thought that the carefully considered and separately delivered, but concurrent, judgments of Sir Lawrence Peel, Sir Arthur Buller, and Sir James Colville, in the case of *Beer Chund Podar v. Ramanath Tagore* (3) and others had, in 1849, conclusively settled the effect of the 17th section of statute 21 Geo. III., c. 70, and should have felt no hesitation in dismissing the suit. I was pressed, however, with the recent judgment of the High Court in the case of *S. M. Jagadamba Dasi v. Grob* (4), in which a decidedly contrary opinion appears to be expressed. I therefore dismissed the case, but in doing so gave judgment contingent upon the opinion of the High Court upon the question—

“Whether the 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu.

“Should the Hon’ble the Judges be of opinion that that section is not applicable, I shall proceed to hear the case on its merits.”

Mr. *Phillips* for the plaintiff.—The law of the Small Cause Court, in cases like this, is substantially the same as that of the late Supreme Court. The statute 21 George III., c. 70, s. 17, applies to Small Cause Courts; as much as to the Supreme Courts or to the High Courts now; and even if the Statute of Frauds, section 4, is a law of procedure of this Court in matters of contract or questions of usage between Mahomedans

(1) 12 C. B., 801.

(3) 1 T. & B., 131.

(2) 1 Ind. Jur., O. S., 70; S. C., 1 Hyde, 51. (4) *Ante*, p. 639.

or *Genus*, that section (17) would prevail over the law of procedure. But section 4 of the Statute of Frauds is not a law of procedure here in cases where the defendant is a Hindu or a Mahomedan. It is a law affecting the contract itself, which, without a memorandum in accordance with section 4 of the statute, is invalid, and cannot be sued on. The Law of Limitation is different: a plaintiff can avoid that by bringing his action within the time limited; but here there could be no avoidance by the plaintiff, and if the defendant refused to sign a memorandum in accordance with the statute, the plaintiff would have no remedy; compliance with the statute being necessary, not to evidence the contract, but to constitute it—*Lloyd v. Guibert* (1); and this is the distinction between cases where the doctrine of the *lex fori* applies, and where it does not. If there have been and cannot be any remedy, it does not apply. It applies in the case of foreigners, because they have their remedy in the Courts of their own country—*Leroux v. Brown* (2), *per Maule and Jervis, JJ.* If the statute be a law of procedure in England, it is not necessarily so strict a law here. Section 17 has been held not to apply to Hindus—*Barrodaile v. Chainsoak Buxaram* (3), *Muttia Pillai v. Western* (4), and in *Jagadamba Dasi v. Grob* (5); section 4 was held not to apply to a Hindu. The case of *Leroux v. Brown* (2) does not stand unchallenged—*Mostyn v. Fabrigas* (6), *Gibson v. Holland* (7), *Williams v. Wheeler* (8).

Mr. Meodje for the defendant.—It is said there would be a hardship to the plaintiff in such a case as this in having no remedy; but if so, it arises from his own fault, for he might have made the contract in writing; the contract, though it cannot be enforced, may be used for other purposes, and is not absolutely no contract at all—*Lavery v. Turley* (9), where a verbal contract was admitted in evidence. If the 4th section of the Statute of Frauds is a law of procedure for British subjects

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(1) 1 L. R., Q. B., 115.

(2) 12 C. B., 827.

(3) 1 Hyde, 63.

(4) 1 Mad. H. C., 27.

(5) *Anta*, p. 639.

(6) 1 Smith's L. C., 623.

(7) 1 L. R., C. P., 8.

(8) 8 C. B., N. S., 316.

(9) 30 L. J. Exch., 49.

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here, it must also be a law of procedure to all who come under the jurisdiction of the Court, for the Court will not change its procedure to suit different classes of persons. The point has never been directly decided until very lately. In *Borrodale v. Chainsook Buxyram* (1), it was held that the 17th section of the Statute of Frauds did not apply to Hindus. In *Ramsagur Dutt v. Nobogopaul Mookerjee* (2), the question arose, but the case was decided on another point. In *Muttiya Pillai v. Western* (3), the defendant was a British subject. The only direct decision on the point is that of NORMAN, J., in *Jagadamba Dasi v. Grob* (4), where it was held that the 4th section is inapplicable to Hindus. As part of the *lex fori*, the 4th section is applicable to Hindus. It is part of the *lex fori* in England—*Leroux v. Brown* (5), where the Judges were unanimous. Doubt has been thrown on that decision by Willes, J. in *Williams v. Wheeler* (6); but until overruled, it is an authority. Section 4 was introduced into this country as part of the *lex fori*, and applies to British subjects. But if introduced as part of the *lex fori*, it has become a part of the law of procedure of this Court, and as such applies to Hindus, as well as British subjects. To hold the contrary would be to overrule the case of *Leroux v. Brown* (5). The arguments used on the other side would be as applicable to the Statute of Frauds as to the Law of Limitation and the old Law of Limitation, 21 Jac. II., c. 16, was held to apply to Hindus as part of the *lex fori*—*Luckmaboye v. Lulloohby Mottichund* (7). Hindus and Mahomedans are not exempted from the effect of the *lex fori*, even by statute 21 Geo. III., c. 70, s. 17—*Beerchund Podar v. Ramanath Tagore* (8). [PHEAR, J.— How was the effect of the Statute of Limitation as a law of procedure affected by the passing of Act VIII of 1859 ?] There was nothing inconsistent in their being together part of the law of procedure; but a new law, Act XIV of 1859, was passed, making the other inapplicable here; so there is no inconsistency in the 4th section of the Statute of Frauds and Act

(1) 1 Ind. Jur., O. S., 70; S. C., 1 Hyde, 51.

(5) 12 C. B., 827.

(2) Bourke's Rep., 367.

(6) 8 C. B., N. S., 316.

(3) 1 Mad. H. C., 27.

(7) 5 Moore's I. A., 235.

Ante, p. 639.

(8) 1 T. & B., 131.

VIII of 1859 existing together as part of the law of procedure. In the charters creating the Mayor's Courts, 13 Geo. I., c. 13, and in that creating the Courts of Requests, 26 Geo. II., c. 27, there are no exceptions in favor of Hindus and Mahomedans, as in the charter of the Supreme Court. The law of the Small Cause courts would be the same as that under these two charters, so that, though section 4 of the Statute of Frauds might not apply to the Supreme Court, in the charter of which there is an exception, yet it would in the Small Cause Court. [Couch, C. J.—The Small Cause Court is governed by Act IX of 1850, and that Act says the law shall be the same as that of the Supreme Court.]

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Mr. Phillips in reply.—In some respects English procedure has not been introduced here. It is only introduced as far as it is applicable: *Lavery v. Turley* (1) is a case in favor of my contention.

The opinions of the learned Judges were as follows :—

Couch, C. J.—The First Judge of the Small Cause Court has referred, for the opinion of this Court, the question whether the 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu, having held upon the authority of the case of *Leroux v. Brown* (2) that it does apply. In that case it was held that the 4th section of the statute, unlike the 17th, had reference to the mode of procedure, and not to the formality of the contract, and consequently that an action would not lie in the Courts of England, to enforce an agreement made in France (and valid there), which, if made in England, could not, by reason of the Statute of Frauds, have been sued upon. Although this decision has been questioned on more than one occasion by an eminent Judge, Mr. Justice Willes, it has not been overruled, and the First Judge was no doubt at liberty to found his decision upon it. We must, however, see whether it is really a binding authority upon the question which has been put. The Statute of Frauds must be considered to have been.

(1) 30 L. J. Exch., 42.

(2) 12 C. B. 801

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introduced into Calcutta as part of the English law by the charter of George the First. by which, in the year 1726, the Mayor's Court was established—*Advocate General of Bengal v. Rance* *Surnomoyee Dassee* (1). Now I cannot suppose that, when it was introduced, any distinction was made between the 4th and the 17th sections, and that one was introduced as a law of procedure, and the other as a law affecting the formalities of the contract. No case had then been decided in the English Courts in which such a distinction was made; and Mr. Justice Story, in his *Conflict of Laws*, section 262, classes the two sections together, as the effect of saying that no action shall be brought whereby to charge any person upon any of the contracts described in the 4th section is practically the same as saying that the contract shall not be allowed to be good; it is not unlikely that the distinction which was made by the Court in *Leroux v. Brown* (2) would not occur to him. Mr. Justice Maule in that case says:—"It may be that the words used operating on contracts made in England render them void." In the case of *Muttiya Pillai v. Western* (3), in which the defendant was a British-born subject, the Court of Small Causes at Tanjore held that the 4th section of the Statute of Frauds was applicable. This decision cannot be supported if the 4th section is only a law of procedure, as no part of the Statute of Frauds has ever been made part of the procedure of a mofussil Small Cause Court. In *Borrodale v. Chainsook Buzryam* (4), Mr. Justice Wells says:—"It is remarkable that, from the time of the passing of the 21 Geo. III., c. 70, down to the present time, the Statute of Frauds has never been pleaded as a defence on behalf of a Hindu or Mahomedan; and this is a strong circumstance to show that the view I take of the law is the correct one, as many cases must have occurred in which the defence might have been raised if applicable to Hindus and Mahomedans." If the 4th section has been considered in India not a law of procedure, but as of the same nature as the 17th section, which it certainly appears to me it has, notwithstanding the difference in the language of the two sections, I do not think we are bound, upon a decision of an English

(1) 9 Moore's J. A., 426.

(3) 1 Mad. H. C., 22.

(2) 12 C. B., 801; see p. 895.

(4) 1 Hyde, 63.

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Court, to alter that state of the law when the effect would really be to make the law of contract for Hindus and Mahomedans in the presidency towns different from what it is in the mofussil. I also think that, as the intention of the 17th section of the 21 Geo. III., s. 70, was to preserve to the natives of India their own laws and usages in questions of inheritance and succession, and matters of contract and dealing between party and party, it may be construed so as to include the proofs or authentication of the contract as being necessary to its validity. They differ from the limitation of the time for bringing a suit upon it. In section 260, conflict of Laws, Mr. Justice Story says :—" Another rule naturally following, or rather illustrative of that already stated, respecting the validity of contracts, is that all the formalities, proofs, or authentications of them, which are required by the *lex loci*, are indispensable to their validity everywhere else ;" and there is a difference of opinion whether the mode of proof is to be deemed part of the *vinculum obligationis*—Westlake on Private International Law, 160. It remains to mention the case of *Manikja Mahomedji v. Rahimtulla Alabhai* (1), in which it was held by the Supreme Court of Bombay, on a case referred by the First Judge of the Court of Small Causes, that the 4th section of the Statute of Frauds is not applicable to Mahomedans. For the above reasons, I am of opinion that the judgment in the Small Cause Court must be reversed, and a new trial ordered, and that the defendant should pay the costs of reserving this case.

PHILLIPS, J.—I agree with the Chief Justice, but I desire to guard myself from being supposed to throw doubt upon the correctness of the decision in *Leroux v. Brown* (2), so far as that decision goes to lay down that the enactment of the 4th section of the Statute of Frauds is substantially a rule of procedure. Indeed, the more closely the section is looked into and considered, the more nearly impossible it becomes, as it seems to me, to class it under any other head.

It is paralleled, I think, with such a rule as that which would disqualify parties to a suit from being witnesses in their own behalf. The effect of this rule in cases of any parcel contract, to which the party alone could speak, would be precisely analogous

(1) 1 Bom. H. C. Rep., 2nd. ed. (4ppar.), I. (2) 12 C. B., 801.

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to that of the 4th section of the Statute of Frauds, for obviously the aggrieved party would be deprived by it of the only means which he possessed of proving his contract; and I suppose no one would consider a rule which disqualified a certain class of persons from appearing as witnesses to be anything other than a rule of procedure. But assuming the section to be, strictly speaking, simply a rule of procedure, another question arises, which I take to be the cardinal question in this matter; for let us look at the immediate consequences of the rule. We see that it renders it impossible *ab initio* for the parties to a certain sort of parol contracts to enforce their rights in a Court of law; it does not come in *ipso facto* like a law of limitation; it does not leave the party who may desire to make himself safe the opportunity of doing so within any period following on the contract: if the other contractor will sign a memorandum, all well and good; but one of the parties alone cannot of himself do anything to mend his position. A rule of this nature, pregnant with these consequences, does directly affect the potential rights of parties under the contract from the very moment of the inception thereof; and if it thus operates to deprive the parties of rights, which but for it they would enjoy, by virtue of any special law governing the contract then the rule of procedure is in conflict with that law upon the very merits of the matter between the parties. At such a point it may, I think, well be questioned whether the principles which admittedly guide the Courts of all countries in the administration of justice under a conflict of law, do not in truth necessitate the abandonment of the rule of procedure in favor of the law of the contract. The Court of Common Pleas, in *Leroux v. Brown* (1), no doubt went the length of holding that the rule of procedure must still be maintained. I think I should hesitate a long time before I should be able to bring myself to concur in that conclusion. Fortunately, however, the case before us has elements in it which materially distinguish it from that of *Leroux v. Brown* (1). The two laws, which are here taken to be in conflict, are laws of the same country and ruling power, not of different countries.

The mode in which these laws are to be adjusted, or to be

(1) 12 C. B., 80 l.

subordinated the one to the other, must be ascertained by giving a reasonable construction to all parts of the law prevailing here which bear upon the point ; and I need hardly say that, if possible, the law should be construed in such a way as to give a remedy to aggrieved persons rather than to take it away. Now, looking at the question in this light, we find ourselves immediately in front of the enactment, section 17 of 21 Geo. III., c. 70, the words of which are :—

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“ Provided always, and be it enacted that the Supreme Court
“ of Judicature at Fort William in Bengal shall have power and
“ authority to hear and determine in such manner as is provid-
“ ed for that purpose in the Letters Patent all and all manner of
“ actions and suits against all and singular the inhabitants of the
“ city of Calcutta, provided that their inheritance and succession
“ to lands, rents, and goods, and all matters of contract and dealing
“ between party and party shall be determined, in the case of
“ Mahomedans, by the laws and usages of Mahomedans ; and in
“ the case of Gentus, by the laws and usages of Gentus, &c.”

Now it is at once apparent that, while the first part of this section makes the manner of hearing and determining, which comprises the procedure of the Supreme Court (and therefore impliedly in my opinion the 4th section of the Statute of Frauds) generally applicable to the actions and suits to which it refers, the latter part expressly cut this down by the proviso that, in the case of Gentus, all matters of contract and dealing between party and party shall be determined by the laws and usages of Gentus ; in other words, the rule of procedure, if it affects the original rights of the parties, must, in the event of conflict, give way to the law and usages of the Gentus. It appears to me that this section makes the present case perfectly clear.

The operation of the 4th section of the Statute of Frauds, in the matter of a parol contract between Hindus, would be practically to prevent rights from arising and being recognized, while the laws and usages of Hindus could be supported and enforced, consequently the section must not in such a case be allowed to operate.

I concur with the Chief Justice as to the order which must be passed.

[APPELLATE CIVIL.]

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July 8.

*Before Sir Richard Couch, Kt., Chief Justice, and Justice Sir O. B. Hall,
house, Bar.*

KARUNAHAR MAHATI (DEMANDANT) v. NILADHRO CHOWDERY
(PLAINTIFF).*

Mokurrari Istemrari Potta—Perpetual Lease—Regulation XIV of 1812

A zemindar in the District of Cuttack granted the following lease:—

"In the chawd-nak 1236 Amli, 17th day of the month of Brisa, Sri Hari Chuckerbutty grants to Nared Manti this istemrari (permanent) potta. For that I execute istemrari potta of my Khardig Ayma in Mauza Bhimpur. Jote land measuring four bigas, being previously to this our occupation, you will cultivate and cause to be cultivated hereafter. Mokurrari (fixed) rent at rupees 8-12 sicea you will pay from year to year. In case of flood or drought, you will be allowed a reduction of rent according as such reduction will be allowed to others. To this Hari Chuckerbutty assents." A subsequent purchaser of the zemindari right obtained a fresh settlement of the zemindar under the Government. The son and grandson of the grantee held successively under the lease.

In a suit by the zemindar against the holder for enhancement of rent, held that the potta was a hereditary lease fixing the rent in perpetuity, and that it was binding on the representatives of the grantor (1).

This was a suit for obtaining a kabuliati at an enhanced rate of rent.

The defendant set up in his written statement that he held the land under an istemrari potta, and therefore was not liable to pay rent at an enhanced rate.

The following is a translation of the potta from the original Oorya:—

"In the chowd-nak 1236 Amli, 17th day of the month of Brisa (Taurus), Sri Hari Chuckerbutty grants to Nared Manti this istemrari potta. For that I execute istemrari potta of my Khardig Ayma in Mauza Bhimpur. Jote land measuring four bigas, being previously to this in our occupation,

* Special Appeal, No. 3027 of 1869, from a decree of the Judge of Cuttack, dated the 20th September 1869, reversing a decree of the Deputy Collector of the district, dated the 20th July 1869.

(1) See *Kailish Chandra Roy. Hiralal Seal*, 2 B. L. R. A. C., 93.

" you will cultivate and cause to be cultivated hereafter. Mokurrari rent at rupees 8-12 sicca you will pay from year to year. " In case of flood or drought, you will be allowed a reduction of rent according as such reduction will be allowed to others. " To this Hari Churkerbutty assents."

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The Deputy Collector held that the potta was valid ; that under the terms thereof, the tenure had been created istemrari (permanent), and the rate, of rent mokurrari (fixed) ; and that therefore the defendant was not liable to pay rent at an enhanced rate. He dismissed the plaintiff's suit.

On appeal, the Judge found that the potta relied upon by the defendant had been granted in 1236 (1829) to the grandfather of the defendant ; that the lands had been held under it ; that the term " istemrari " was used in the potta, but that this could not protect the tenure from enhancement, as none of the lands in Orissa were permanently settled, and therefore no perpetual lease could be legally granted, and that all inferior leases terminated with the termination of the engagements for those lands with Government ; that in the wording of the potta, there was no provision made for the lands being heritable ; that the potta was not granted from father to son, but merely to the grantee ; and that as the engagement between the Government and the former proprietors of the land terminated at the end of 1274 (1867), and as a fresh engagement had been entered into from the commencement of 1275 (1868), and as the present proprietor (the plaintiff) had purchased the lands in 1274 (1867), the potta was not binding on him longer than 1274 (1867). He accordingly held that the tenure was liable to enhancement, and reversed the order of the lower Court.

The defendant appealed to the High Court.

Baboo Mahendra Lal Mitter (for the appellant) contended that the terms of the potta clearly conveyed an hereditary and a permanent interest ; that the words " istemrari " and " mokurrari " used in the potta signified such a right, and cited *Mussamut Lakku Kowar v. Roy Hari Krishna Singh* (!) ; that even if

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there be any doubt as to the construction of the potta, and fact of the tenure descending from father to son, from generation to generation, without any variation of rent, was strong evidence of its hereditary and permanent character—*Baboo Gopal Lall Thakoor v. Teluckchunder Rai* (1); *Raja Satyasaran [Ghosal v. Mahesh Chandra Mitter* (2); that even if the grantor's potta settled with Government for a limited period, he could not, on that ground, repudiate his own act, and annul the potta which he himself had granted, on the ground that he had no right to grant the same; that the words of the Regulation XIV of 1812 that any such grant shall be "null and void" mean that it shall be null and void as against Government or any person claiming through Government—*Mutty Lall Sen Gywal v. Deshkar Roy* (3); *Ranes Surnomoyee v. Maharajah Suttees Ohunder Roy Bahadoor* (4).

Baboo Taraknath Sen for the respondent contended that, under section 8, Regulation XIV of 1812, the potta was null and void; that the grantor had no power to grant a lease beyond the period for which he himself had obtained a settlement under Government. He had no power, under the law, to fix the rent beyond his own terms, and any infringement of the law renders the act void. Under its terms, the potta was not a perpetual lease; and as, a fresh settlement had been entered into by the present proprietor with Government, the act of his vendor could not be binding on him.

The judgment of the Court was delivered by

COUCH, C. J.—In this case, in the potta itself, the parties to it described it as an istemrari potta, and its terms are:—"In future you shall cultivate the lands, and a mokurrari rent of rupees 8-12 every year you shall pay," followed by a provision for a remission in case of drought or flood. If the intention of the parties that the potta should be perpetual is not sufficiently shown by the use of the word "istemrari," the potta may be

(1) 10 Moore's I. A., 191.

(3) Case No. 1116 of 1862; Dec. 14th, 1869.

(2) 2 D. L. B., P. C., 27.

(4) 10 Moore's I. A., 123.

explained by what has been done under it, and the fact that the and has been allowed to descend from defendant's grandfather to his father, and from him to the defendant, shows that it was intended to be hereditary, although it contains no words to that effect, and the Judge was wrong in laying any stress upon that omission.

The principle that the absence of words importing the hereditary character of the tenure may be supplied by evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son was laid down by the Privy Council in *Baboo Gopal Lall Thakoor v. Teluckchunder Rai* (1) and in *Rajah Satyasaran Ghosal v. Mahesh Chander Mitter* (2). In both those cases the enjoyment had been much longer than in the present; but the word "istemrari" had not been used as it is here. That word shows an intention that the lease should be perpetual; and if it were so, the hereditary character would follow from it. In *Mussamut Lakhu Kowar v. Roy Harikrishna Singh* (3), it was held that the words "mokurrari" and "istemrari" in a potta must be taken in themselves to convey an hereditary right in perpetuity.

The objection that the rent is not fixed, because there is a provision for a remission, is of no weight, nor can the plaintiff, because there has been a new settlement, say that he is not bound by the potta. The new settlement has been made with him as representing the holder under the former settlement, and he cannot take the benefit of that representation, without taking the burden also. He must, like any other heir, be bound by the acts of the ancestor from whom he derives the estate.

But it was also objected that this potta was rendered null and void by Regulation XIV of 1812, section 3, and upon this point we took time to consider our judgment. By that Regulation it is provided that (section 2) "no zemindar or other proprietor of land in the Ceded and Conquered Provinces shall grant leases or fix the rent of any land tenure for a term exceeding ten years, or if the term of his own engagement with Government be less than ten years, extending beyond such less term;" (section 3) "any evasion of this prohibition by entering into separate

(1) 10 Moore's I. A., 191.

(3) 3 B. L. E., A. C., 226.

(2) 2 B. L. E., P. C., 27.

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“ engagements or leases to take effect successively, or by dating
 “ an engagement or lease on a day other than that on which it
 “ was actually executed, or by any other device, shall be consi-
 “ dered as an infringement of it ; and every lease or engagement
 “ fixing the rent, which has been or shall be concluded or granted
 “ in opposition to this prohibition, is declared to be null and void.”

Now it is a rule that the preamble of a Statute may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient if not restrained. The allowing the grantor of a potta at any time, no matter how long after it was granted, to avail himself of this Regulation to nullify his deliberate act is, we think, an inconvenience which justifies our resorting to the preamble of the Regulation. That says :—“ Whereas it
 “ is enacted by section 2, Regulation V of 1812, that proprietors
 “ of lands shall be competent to grant leases for any period
 “ which they may deem most convenient to themselves and ten-
 “ ants, and most conducive to the improvement of their estates ;
 “ and whereas Regulations IX and X of 1812 contain rules under
 “ which the settlement which had been made in perpetuity in
 “ the Ceded and Conquered Provinces, with the reserve of the
 “ approval of the Honorable the Court of Directors, is subject
 “ to considerable modifications and restrictions ; and whereas
 “ these rules consequently create a necessity for limiting the
 “ power granted by section 2, Regulation V of 1812, as above
 “ noticed,—the following rules have been enacted to be imme-
 “ diately in force in the Ceded and Conquered Provinces, includ-
 “ ing the territory Ceded by His Highness the Peishwa in
 “ Bundelcund, the District of Cuttack, and the pergunnas for-
 “ merly dependent on that district, but now annexed to the Zilla
 “ of Midnapore.”

The reason for making the Regulation is the necessity created by the rules in Regulations IX and X of 1812, and the term of ten years is fixed upon, as the settlement then in force was for ten years. When the period of the settlement had been extended, we find Regulation XIV of 1812 modified accordingly by Act XVI of 1842. The proper construction of the Regulation seems to be that the lease was to be null and void as against the Government, but not as against the lessor.

The decision of the Privy Council in *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy* (1) was upon this principle, and the case of the Statute of 1st Eliz. c. XIX, s. 5, referred to in the judgement, is closely applicable to the case now before us. The words of that statute are "shall be utterly void and of none effect to all intents, constructions, and purposes;" and it was held that the "lease or grant is not void or voidable by the Bishop himself who made it, but remains good against him during such time as he continues Bishop;" and the reason given is, "because such leases or grants were good at the common law, and the statutes were made only for the benefit of the successors, that they should not be bound by those acts of their predecessors which might turn to their prejudice and disadvantage; but not to give the Bishop himself power to avoid or derogate from his own acts which would be against all rules, both of law and equity, and therefore was not within the meaning of the said statutes; for then he would be empowered by Act of Parliament to do wrong to other persons, which it cannot be presumed the Parliament intended to allow"—Bacon's Abridgment, Title Leases and Terms for Years, H).

We are opinion that the Judge was wrong in reversing the decision of the Deputy Collector who had held the potta to be valid and that the Judge's decision must be reversed, and the respondent must pay the costs of this appeal, and of the appeal in the lower Appellate Court.

Judgment reversed,

(1) 10 Moore's I. 4. 123.

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[FULL BENCH.]

Before Sir Richard Couch, Kt. Chief Justice, Mr. Justice Bayley Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

THE QUEEN v. DHONA BHOoya AND OTHERS.*

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Aug. 23,

(Criminal Procedure Code) Act VIII of 1869, ss. 445A, 445C—Deputy Commissioner—Appeal.

The right of appeal to the High Court given by section 445 C of the Criminal Procedure Code to persons convicted on a trial held by an officer invested with the power described in section 445 A, is confined to cases in which the officer has exercised that power.

THIS case was referred to a Full Bench under the following orders by

L. S. JACKSON, J.—This is an appeal against a conviction before the Deputy Commissioner of Singbhoom. The prisoners having been found guilty of committing house-trespass by night, in order to the commission of theft, under section 357 of the Indian Penal Code, were sentenced respectively to one year and two year's rigorous imprisonment; in the latter case, corporal punishment was superadded. The appeal of the prisoners has been transmitted to this Court apparently on the ground that the Deputy Commissioner is an officer invested with the powers conferred by section 445A of the Code of Criminal Procedure amended by Act VIII of 1869.

There is nothing upon the record that I can find to show, that the particular Deputy Commissioner is invested with the powers in question, but, assuming that he is so, it appears to me for more than one reason that the appeal does not lie to the High Court. In the first place, in deciding the case of the prisoners, the Deputy Commissioner does not appear to have exercised those powers at all. The case was referred to him by a subordinate Magistrate, under section 277 of the Code of Criminal Procedure, which directs that when a subordinate "Magistrate shall consider

*Criminal Appeal, No. 488 of 1870, from an order passed by the Deputy Commissioner of Singbhoom, dated the 6th July 1870,

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"the offence established against the accused person to call for a more severe punishment than he is competent to adjudge, he shall record the finding and submit his proceedings to the Magistrate to whom he is subordinate, and such Magistrate shall pass such sentence or order in the case as he may deem proper, and as shall be according to law." I apprehend, therefore, that this conviction was made by the Deputy Commissioner in the course of his ordinary, jurisdiction and duties as a Magistrate, and that, accordingly, the appeal would lie to the Court of Session.

But, even if it appeared that he had, in dealing with this case, exercised the jurisdiction specified in section 445A, I should still think that the appeal would not lie to the High Court. Section 445B. provides that "such chief officer shall try as a Court of Sessions, offences which, under the schedule hereto annexed, are triable by Court of Session only, and in such trials shall be guided by the rules contained in Chapter XXV of this Code;" and immediately following that is the section 445C which declares that "any person convicted on a trial held by any officer invested with the power described in section 445A, may appeal to the High Court, and no appeal against such conviction shall lie to the Court of Session."

The result of these provisions is that two procedures are provided for an officer exercising the powers in question. One in respect of offences which are triable by a Court of Session only, and in respect of which offences he is required to try the accused as a Court of Session; but in regard to offences in which the Magistrate has concurrent jurisdiction with the Court of Session, apparently he has to try them as a Magistrate, but with the increased powers conferred by section 445A. I incline to think that the words "convicted on a trial" in section 445C, refer, if not to trials held by such officer as a Court of Session, at all events exclusively to cases in which he has exercised the powers conferred by section 445A; and that where he has not acted in the exercise of those powers, but merely in the exercise of his jurisdiction as a Magistrate, the appeal will lie as in the case of other Magistrates to the Court of Session.

I am also of opinion that the word "trial" refers to the trials

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mentioned in the preceding clause and that "any person convicted on a trial" held by such officer, means on a trial held by the officer as a Court of Session.

It appears that, in other cases of like appeals, several Division Benches of the Court have entertained the appeal, and therefore it seems to be necessary to refer the point for the decision of a Full Bench. It is a matter of importance, because if the High Court be required to hear appeals from Magistrates who are invested with this jurisdiction, no matter what the nature of the offence or the amount of punishment may be, a very considerable amount of additional business will be thrown upon the Court.

MITTER, J.—I concur in the order of reference, but I express no opinion on the point referred.

The opinion of the Full Bench was delivered by

JACKSON, J.—We are of opinion that an appeal lies to the High Court, only when the conviction has been come to under the powers specified in section 445 A, Act VIII of 1869.

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Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

THE QUEEN v. NARAYAN NAIK AND ANOTHER.*

Code of Criminal Procedure (Act XXV of 1861), Chap. XI—Complaint, Irregularity in recording—Power of the Court of Session.

9 B.L. R. 60.

A Court of Session is competent to proceed to the trial of a prisoner brought before it upon a charge by a Magistrate authorized to make a commitment, though the complaint to authorization be contained only in a letter from the Judge of that Court to the Magistrate of the district, sent with the record of the case notwithstanding an irregularity or defect or form in recording the complaint.

The complaint or authorization of the Court before which or against the authority of which, an offence mentioned in Chap. XI of the Code of Criminal Procedure is alleged to have been committed, is a sufficient warrant for commencement of criminal proceedings.

The Queen v. Mahim Chandra Chuckerbutty (1) overruled

* Case called for from the Sessions Judge of Cuttack, on revision of the Jail Delivery Statements of his District for the month of May last.

(1) 3 B. L. R., A. Cr., 67.

THE following questions were referred to a Full Bench by
L. S. JACKSON and MITTER, JJ.

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1st.—Whether a Court of Session is not competent to proceed to the trial of a prisoner brought before it upon the charge of a Magistrate who is authorised to make a commitment, although it should be objected that there has been some irregularity or defect of form in recording the complaint.

2nd.—Whether in the class of cases to which the 11th Chapter of the Code of Criminal Procedure relates, the complaint or authorization of the Court, before which or against the authority of which such offence is alleged to have been committed, is not sufficient warrant for commencement of criminal proceedings.

The questions were referred under the following remarks by

L. S. JACKSON, J.—The case of Narayn Naik and Ram Naik was called for by this Court on a review of the abstract statements of the Court of Session of Zilla Cuttack. The proceedings having come up, it appears that these persons were severally charged with having given false evidence in a judicial proceeding under section 193 Indian Penal Code, and that the Court of Session, without proceeding to trial, has discharged the accused persons on the ground of certain irregularities set forth fully in the case of Narayan Naik, on reference to the judgment in which case that of Ram Naik has been disposed of.

It seems that these persons gave the evidence which was charged as being false before the Deputy Magistrate, who, after disposing of the case in which the evidence was given, sent the record to the Magistrate of the district with a letter saying that he charged the prisoners with giving false evidence. Thereupon the Magistrate made an order referring the case to another Deputy Magistrate, who thereupon summoned the parties, and after taking evidence committed the prisoners to the Sessions.

The Judge is of opinion that as no formal complaint was made under section 66, Code of Criminal Procedure, nor charge preferred under section 135 before the Police, the Deputy Magistrate or the Magistrate of the district was not authorised to take up the case, and consequently the preliminary proceed-

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ings were illegal and void, and the commitment also illegal. He comes to this conclusion on the authority of the case of *The Queen v. Mahim Chandra Chuckerbutty* (1), in which the prisoners, who had been convicted under the 183rd and other sections of the Indian Penal Code, had their conviction quashed, and were discharged.

The decision in question was one of Justices Kemp and Markby. It has, undoubtedly, gone the length of holding that no trial in a Court of Session can be properly held in which the proceedings had not commenced in one of the three modes described in sections 66, 68, and 135, Code of Criminal Procedure.

With great respect to the learned Judges who held this opinion, it seems to me that Courts of Session are required to take cognizance of offences upon a charge preferred by a Magistrate empowered under the Code to make commitments to such Courts, and that if such commitment has been made, and the trial in the Court of Session has been properly held, the accused person should not be allowed to have the trial and conviction quashed upon the ground of any defect in the mode of recording the original complaint; and it also appears to me that in the class of cases referred to in section 169, the letter of the Deputy Magistrate, before whom the alleged false evidence was given, was an amply sufficient ground for the commencement of the proceedings. I should have thought, if it had not been for the decision already cited, that in the case of offences specified in section 168 of the Code of Criminal Procedure, the letter of the Judge of the Court of Small Causes, which was the foundation of the proceedings in that case, was still more abundantly sufficient, because the Code says that "a charge of contempt of the lawful authority of any Court or public servant shall not be entertained in any Criminal Court except with the sanction or on the complaint of the Court or public servant concerned." It appears to me that when that Court addresses a public proceeding to the Magistrate complaining of the offence described, that that is a sufficient foundation for criminal proceedings, and

(1) 3 B. L. R. A. Cr., 67.

that the Judge of that Court is not bound to come before the Magistrate and lodge a complaint and sign it in the ordinary manner, though it might be necessary for him to give evidence.

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But even if the recording of a complaint were prescribed, it seems to me that the omission to record such a complaint, through the usual forms, would not be a ground on which the prisoner would be entitled to have the conviction set aside. If this case had come before me, and the case of *The Queen v. Mahim Chandra Chuckerbutty* (1) had not occurred, I should certainly have been disposed to set aside the order of the Sessions Judge, and to direct the prisoners to be tried. It appears to me that we cannot make that order without coming in direct conflict with the ruling referred to; and therefore it is necessary to make a reference in this case to a Full Bench.

The opinion of the Full Bench was delivered by

L. S. JACKSON, J.—We are of opinion that the Court of Session is competent and ought to proceed to the trial of a prisoner who is brought before it upon a charge exhibited by a Magistrate who is authorized to make a commitment, notwithstanding any irregularity or defect of form in recording the complaint.

Also that, in the class of cases specified in the second question referred, the complaint or authorization of the Court concerned is a sufficient warrant for the commencement of criminal proceedings.

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Markby.

BABOO MOHAN LAL BHAYA GYAL AND ANOTHER (PLAINTIFFS.) v.
LACHMAN LAL. (DEFENDANT).*

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*Act VIII of 1859, s. 2—Act XIV of 1859, s. 1—Cause of Action—
Res judicata.*

A. a Hindu of Gya, died, leaving a sister B., and C. the son of a deceased sister. On A's death B took possession of the property left by A. In a suit by C against B for recovery of possession thereof, as heir to his maternal uncle the Court of first

* Regular Appeal, No 8 of 1870, from a decree of the Subordinate Judge of Gya, dated the 2nd October 1869.

(1) 3 B. L. R. A, Cr. 67.

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instance held that B. should retain possession of the property during her life-time, without power of waste; and that on her death, C. should be entitled to the possession thereof. This was reversed by the High Court on appeal, who held that "the decree should have been simply a decree of dismissal" of the plaintiff's suit.

B. died, leaving an adopted son, D. C. sued D. for recovery of possession of the property, the subject-matter of the former suit on the ground that D was not the adopted son of B. and that C. "who came within the class of *bandhus*, was entitled to succeed to the property left by A. and B there being no nearer heir in existence." Held, that section 2, Act VIII of 1859, did not bar the suit.

THIS was a suit to recover certain landed property by right of inheritance as founded on "the Mitakshara law of the Benares school." The plaint stated that Sitaram Meherwar, the maternal uncle of the plaintiffs, died on the 6th Falgun 1264, Fasi (14th February 1857), leaving the plaintiffs, his sisters' son's and his sisters, Mussamat Inderkumari Dai and Padam Dai, and the properties in dispute; that Mussamat Inderkumari Dai succeeded Sitaram Meherwar, and remained in possession of his estate, and died on the 21st May 1868, leaving no issue; that on the death of Inderkumari, the Government laid claim to the property as an escheat; that thereupon the plaintiffs had applied for the release thereof, on the ground of their right of inheritance; that in that case the defendant had intervened on an allegation of a pretended adoption by Inderkumari; that the case was disposed of under a proceeding dated 21st October 1868, with the following order:—"A sister's son is entitled to inheritance, and when two parties assert their right to succeed, how can the estate be confiscated by Government?" that the defendant has obtained possession, both of the real and personal property; that the defendant was not the adopted son of Inderkumari Dai, and therefore was not entitled to the property in dispute; and that the plaintiffs, who came within the class of *bandhus*, were entitled to succeed to the property left by Inderkumari and Sitaram, there being no nearer heir in existence.

The defendant set up, *inter alia*, that, whereas, after the demise of Sitaram, the plaintiffs' claim for inheritance to the property left by Sitaram had been disallowed in a suit brought by the present plaintiffs against Inderkumari, the plaintiffs were barred from bringing the present suit; and that, as he was the adopted son of Iderkumari, he was entitled to retain possession of the property in dispute.

The Subordinate Judge of Gya raised, *inter alia*, the following issue :—

“ Whether sections 2 and 3, Act VIII of 1859, apply to this case, and with what result ? ”

He said as follows :—“ On a reference to the decision of this Court, dated the 24th February 1864, in the case of this very plaintiff against Inderkumari Dai and others, it appears that this very plaintiff instituted the suit mentioned in the said decision, in respect of the property now in suit, alleging it to be the estate of his maternal uncle, Sitaram, deceased. In the said case, this issue was laid down, *viz.*, ‘ whether, ‘ as alleged by the plaintiff, it is true that, after the demise of ‘ his maternal uncle, Sitaram Meherwar, the right to succeed ‘ him devolved, by the dharm shastras prevailing in the province ‘ of Behar, on plaintiff ; or, as alleged by defendant, Inderkumari Dai, is it true and correct that, during her life-time, no ‘ right accrues to a sister’s son according to the shastras prevailing in the countries of Benares and Mithila ? ’ The former Judge of this Court, by the said decision, made a decree in favor of plaintiff in these terms :—‘ Mussamat Inderkumari Dai, ‘ defendant, should, during her-life-time, hold possession of the ‘ decreed property, the estate of Sitaram Meherwar, without ‘ power to waste, and, after the demise of the said lady, ‘ plaintiffs will be entitled to hold possession of the estate of ‘ the said deceased person.’

“ On a reference to a copy of a judgment of the High Court, dated the 1st September 1864, in a case in which Mussamat Inderkumari Dai, the defendant in the case mentioned in the decision of the 24th February 1864, was appellant, and this very plaintiff, respondent, it appears that the Honorable Judges held that the plaintiff, that is, Mohan Lal, did not establish his right of action ; that the lower Court’s findings regarding the character of the defendant’s estate, and further as to the plaintiff being, after the demise of the widow, entitled to obtain possession, were extrajudicial, and that the proper order was one of dismissal instead of decree ; and accordingly they admitted the appeal, that is, reversed the decision of the first Court.

“ With reference to the features of the case, the allegations in

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the previous and present suits of plaintiffs, the subject-matter of the suit, and the facts that, in the previous suit, the disputed property was the estate of Sitarum ; that the disputed property in the present suit is (according to the examination of plaintiffs' pleader in Court) represented to be the estate of the said Sitarum ; that in the previous case, the present plaintiff was plaintiff, and Mussamat Inderkumari Dai, defendant ; and that in this case, the said plaintiff is plaintiff, and the *locum tenens* of defendant, Inderkumari Dai, is defendant."

He accordingly dismissed the suit with costs.

The plaintiffs appealed to the High Court.

Baboo Mahes Chandra Chowdhry, for the appellant, contended that section 2, Act VIII of 1859, did not apply, and cited *Sudamund Mohapattur v. Soorjo Monee Debee* (1), *Mahima Chandra Chuckerbutty v. Rajkumar Chuckerbutty* (2), *Mussamat Edum v. Mussamat Bechun* (3), *Kanhya Lall v. Radha Churn* (4), *Kriparam v. Bhagawan Das* (5), *Ooma Churn Dutt v. Beckwith* (6), *Janeswar Das v. Gulzari Lal* (7),

(1) 8 W. R., 455.

(2) 1 B. L. R., A. C., 1.

(3) 8 W. R., 175.

(4) 7 W. R., 338.

(5) 1 B. L. R., A. C., 68.

(6) 5 W. R., Act X Rul., 3.

(7) Before Mr. Justice Kemp and Mr. Justice Glover,

JANESWAR DAS v. GULZARI LAL.

The 8th March 1869.

KEMP, J.—In this suit the plaintiff, special respondent, sues for confirmation of title and declaration of possession under a deed purchasing the mokrurari rights of the defendant, No. 3. Defendants Nos. 1 and 2 alleged that the deed, under which the plaintiff claims, is a fraudulent deed, and that the holding is a khasht-kari one. The Judge holds that the deed under which the plaintiff claims, viz., a mokrurari sanad, has been sufficiently and clearly proved and; that the plea in bar set up by the defendants Nos. 1 and 2, that the suit of the plaintiff is beyond time, was untenable, and that the evidence adduced by defendants Nos. 1 and 2, in support of the

several pleas raised by them, was untrustworthy. The decision of the Court of first instance was therefore affirmed. The first point taken in special appeal is that the question of whether the tenure purchased by the plaintiff was a mokrurari tenure or not having been adjudicated upon by the Revenue authorities, no suit will lie in the Civil Court to set aside the decision of the Revenue Court. On this point we find that there was no adjudication in an issue raised in the Act X suit upon the validity of the mokrurari tenure. The decision of the Revenue authorities was conclusive of the cause of action then heard and determined, and nothing further. The issue tried by the Collector was the amount of rent for which the defendant in the Act X suit was liable. The mokrurari potta may have come collaterally in issue in the Act X suit for the purpose of enabling the Court to adjudicate upon the question of the amount of rent due by the defendant in that suit. But there was no decision upon the validity or otherwise of the mokrurari by which the plaintiff is estopped.

Tekaitui Gowra Kumari v. The Bengal Coal Company (1).

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(1) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*BABOO MOHAN
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TIF) v. THE BENGAL COAL COM-
PANY (DEFENDANTS).
4th February 1870.

JACKSON, J.—The plaintiff brought this suit to recover possession of Kuldia Gadi Karbarbari, Pergunna Kharakdea, from the defendants. The plaintiff stated that the defendants, Piru Kumari and others, were in possession of this estate under temporary leases, the term of which had expired, and that she was consequently entitled to dispossess them; but the defendants had got up in a former rent suit a false mokurrari tenure of the estate, and had granted a sub-lease of the other defendants, the Bengal Coal Company, and under color of the said false mokurrari were preventing her from obtaining possession of Manza Kuldia. The plaintiff, accordingly, sued to oust the defendants, and to obtain mesne profits from them. The defendants, Piru Kumari and others, in answer stated that they and their ancestors had held the village of Kuldia in mokurrari for generations, and that Bahadur Sing, an ancestor of the plaintiff, had confirmed their mokurrari rights by the grant of a potta in the year 1201, to their ancestor, Kripal Sing, and that they had all along held possession, and had given a sub-lease to the Bengal Coal Company. The Bengal Coal Company were made defendants in the suit, and put forward their claims to possession of the village under their lease from the mokurraridar defendants. The Deputy Commissioner of Hazaribagh was of opinion that neither the temporary leases set up by the plaintiff, nor the mokurrari potta set up by the defendants, were valid or genuine, but that it was proved to his satisfaction that the defendants had held this village, Kuldia, at a fixed rent, for more than 12 years anterior to the institution of the suit, and that such holding was adverse

to the plaintiff, and the plaintiff's suit was consequently barred by the Law of Limitation. With reference to the next point raised by Mr. Paul, I am of opinion that the judgment in the rent suit passed by the Moonsiff in the year 1860, and confirmed on appeal by the Principal Assistant Commissioner of Hazaribagh in the year 1861, is not conclusive evidence in the present suit. The subject-matter of that litigation was the question whether any arrears of the rent were due to the plaintiff from the defendants. It was alleged that, for the three years 1264, 1265, and 1266, a few rupees of rent had remained unpaid in each year. In order to decide this question, it became necessary to enquire into the validity of the leases now set up by the plaintiff, and which he then set up, and also into the validity of the mokurraripotta which the defendants now set up, and which they then brought into Court. The contest as to whether the alleged arrears of rent were due, in fact turned upon the question of these documents. In order then to decide as to the arrears of rent, the Courts went into evidence as to the genuineness of the documents. But the decision which they then arrived at is not conclusive in the present suit in which the plaintiff claims to recover the village, a property valued at nearly two lakhs of rupees. It is stated that this decision forms what in English law is called an estoppel. I think it is very doubtful whether any decision is an estoppel, except such as would come within the provisions of Section 2, Act VIII 1859. If any subsequent suit had been brought for the alleged arrears of rent for the years 1264, 1265, and 1266, the decision in the former suit would prevent its being heard, supposing that the cause of action was the same. But if a suit had been preferred for the rent of the year 1267, I am not satisfied even upon the English law books that the decision for the former years would be what in English law is called

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Baboo Mahendralal Shome contended that section 2, Act VIII of 1859, barred the present suit. In the former suit against

an estoppel. It would be evidence and most important evidence, and it might be a question whether it was not to be considered by the Court conclusive evidence; but I am not prepared to say that no evidence could be offered to prove any fact which had been found against on the former occasion. But the case before us is much stronger than that. It has always been held that, for a decision to be conclusive evidence, it must not be passed by an inferior Court. If the judgment of an inferior court is offered to prove the same facts, but for a different purpose, it is admissible in evidence, and the proceedings can be looked at; but the decision is not conclusive evidence. This rule is very distinctly laid down in Starkie's Law of Evidence. It was also laid down by Peacock, C. J., in the case of *Mussamut Edun v. Mussamut Bechun* (a). In the ruling there laid down, I entirely concur. "It is quite clear that, in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." To rule otherwise would bring about the result that any plaintiff could oust the superior Courts of their jurisdiction by bringing a tentative case in the inferior Courts for some small matter, collateral to the real important fact which is in dispute between the parties. Looking to the constitution of the Courts in this country, it would be making over the most important suits to the decision of the lowest Courts. It may well be that if the plaintiff's story is true, he never heard of the defendant's mokrurari until he had preferred his suit for rent in the Moonsiff's Court, and the defendant had put in his answer. The jurisdiction to try this question now in dis-

pute finally and conclusively would, in such a case, be given to the Moonsiff by the act of the defendant. The Moonsiff had, as every inferior Court has, jurisdiction to try every matter which is necessary for the adjudication of the point which is in contest before him, whether it involves interests of the largest value or the smallest; but such decision is only final as regards the fact which he is adjudicating upon. It is not a final adjudication for the decision of other facts which are not in contest before him. A decision by Morgan and Shumoonath Pandit, J.J., *Ooma Churn Dutt v. Beckwith* (b), has been cited in which the law is laid down in different terms, but the question did not on that occasion directly arise. Another decision, *Chowdhary Nilkanth Prasad Singh v. Dignarayan Singh* (c), has been cited, but it seems there to have been taken for granted that the Court which previously decided the question at issue was a Court of concurrent jurisdiction. At least that point was not debated or taken into consideration, and finally the appeal was decided on another point altogether. A third case, *Chunder Shekhur Deb Roy v. Doorgendro Deb* (d), has also been cited, but it is not certain that the Judges there intended to lay down a different ruling. That was a question as to the validity of a mokrurari sanad and they laid down that the validity of the sanad was still open to question in relation to any other matter than the rent suit, though it must be admitted that it is difficult to reconcile the decision in that case with that dictum. Mr. Justice Phear, who was one of the Judges in that case, has recorded his opinion on the point again in the case of *Mussamut Edun v. Mussamut Bechun* (a).

KEMP, J.—..... With reference to the decisions in the rent suits.

(a) 8 W. R., 175.

(b) 5 W. R., Act X Ral., 3.

(c) 1 B. L. R., A. C., 30.

(d) 3 W. R., 39.

Inderkumari, the plaintiff, according to the interpretation of the law then prevalent, was held to be no heir to his maternal uncle.

The plaintiff's cause of action is the same now as it was in the former suit, *viz.*, the death of his maternal uncle and dispossession by Inderkumari. The former suit was against Inderkumari, the present is against her representative. The parties being the same, the suit is not cognizable. Inderkumari's death gave rise to no fresh cause of action. The plaintiff does not claim as heir of Inderkumari. The plaintiff, having once been declared to have no right to the property in dispute, cannot question the adoption by Inderkumari.

Baboo *Chandra Madhab Ghose*, on the same side, contended that the plaintiff sued in this case to recover the estate of Sitaram upon the title of inheritance. The inheritance opened out to him (if it did so at all) on the death of Sitaram, and his cause of action to recover the estate accrued then and there, and he accordingly brought the previous suit.

The decision of the Principal Sudder Ameen in that case, as modified by the High Court, held plaintiff to have no right as heir to Sitaram. The question then arises whether plaintiff can maintain a fresh suit upon the same title of inheritance, which formed the basis of the previous suit. There was a final decision as against the plaintiff in the suit that was brought upon the true and only cause of action, and the death of Inderkumari does not give plaintiff any fresh cause of action whatever. True

I am of opinion that they cannot be used as estoppels. It may be difficult to reconcile the different decisions of this Court which were cited by counsel on both sides during the argument; but looking to the established principles which govern rent cases, I have no doubt whatever that we are not precluded from going into all the questions of title raised in the present suit notwithstanding the decisions in the rent suits. The parties in the rent suits and in this suit are, it is true, the same, but the subject-matter and the cause of action in

the rent suits and in this suit are not the same. Issues may have been laid down in the rent suits leading up to the main question for adjudication in those suits, *viz.*, whether any rent was due or not, and in order to arrive at a conclusion on that question, it may have been necessary inadvertently to go into the question of title. The remarks of Peacock, C. J., in *Mussamut Edun v. Mussamut Bechun (a)*, which have been quoted by Mr. Justice E. Jackson, are also clearly in point.

(a) 8 W. R., 175.

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it is that the plaintiff alleges that the death of that lady affords him a new cause of action, and the second issue of fact was framed with reference to such allegation. But the Court will not allow a party to avoid the application of the principle of *res judicata* by simply alleging a fresh cause of action.

Baboo Mahes Chandra Chowdhry in reply.

BAYLEY, J.—I am of opinion that the judgment of the lower Court is wrong, and must be reversed.

The plaintiffs in this case are the sister's sons of one Sitaram Meherwar; they sue for certain landed property left by Sitaram; they state that their cause of action arose on the death of Inderkumari Dai, the sister of Sitaram, and was the retention by the defendant of the property, on the allegation of heritage by right of adoption; they say that the defendant in this suit is a stranger, and has no right whatever to the property in dispute.

The answer of the defendant is that he is the adopted son and heir to the property of Inderkumari, and that, according to the family custom and usage of Gyals, a widow is competent to make adoption, and the party adopted becomes her and her husband's heir and successor.

The lower Court dismissed the plaintiffs' suit with costs on the ground that, according to certain precedents of this Court, the provisions of section 2, Act VIII of 1859, applied to this case, and that it could not therefore be heard.

The one ground of appeal to which we find it necessary, after argument, to direct attention in this case, is the first, *viz.*, that the Court below has erroneously considered that the present suit is barred by section 2, Act VIII of 1859, inasmuch as the cause of action in the present suit is different from that in the former.

The terms of section 2 are these:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim." The general current of decisions has established that the cause of action

should be the same ; that the case should have been heard and determined by a competent Court ; and that the parties must be the same, either actually or by representation.

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Now the cause of action in this case, as clearly alleged by the plaintiffs, was the retention of certain property, of which the defendant, by averment of his right of inheritance by adoption, prevented the plaintiffs, as sister's sons, from obtaining possession ; and it was clearly stated in the plaint that this the plaintiffs' cause of action arose on the death of Inderkumari.

The former suit, which the lower Court holds to be a bar to the plaintiffs' present suit, is Regular Appeal, No. 150 of 1864, decided by this Court on the 1st September 1864. In that suit the present plaintiffs sued Inderkumari, alleging that the said Inderkumari, as a childless Hindu widow, had no right to hold the property in suit under the Hindu law.

The answer of Inderkumari to that suit was that the circumstance of her being a widow was no bar to her succeeding as heir to the property left by her deceased brother, because she was the heir of her brother while the plaintiffs were mere strangers.

The decision of the lower Court in that case was that Inderkumari should retain possession, so long as she lived, of the property left by Sitaram, but that she would be incompetent to waste it, or to do an act calculated to cause its loss, and that, after her death, the plaintiffs should be entitled to possession.

From that decision Inderkumari appealed, and it is quite clear, from the following judgment passed by Morgan and Pundit, JJ., that the only objection taken in that case was that the lower Court was wrong in decreeing that, after the death of Inderkumari, the plaintiffs were entitled to possession of the property. The learned Judges say :—" The objection taken " to this decree by the appellant is correct. The decree should " have been simply a decree of dismissal, instead of which the " Court has gone on (at the instance of the plaintiff who has " failed to prove any right of suit) to declare the nature of the " defendant's estate, and further to declare that the plaintiff shall " be entitled to possession of the property after the widow's

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“ death. It is clear that the proper decree is a decree simply dismissing the plaintiff's suit. That is the decree which we shall make, allowing this appeal with costs.”

Some arguments have been attempted to be made to the effect that this decision shows that the plaintiff failed to prove his right of suit, because it was held that, as a sister's son, he had no right to maintain it ; but it must be observed that the sentence is parenthetical, and no one can fail to see that the judgment disposed of the case only on one point, *viz.*, that the lower Court was wrong in ordering that the plaintiffs were entitled to possession after the death of Inderkumari.

Having now put in juxtaposition the cause of action in the suit of 1864 and that of the present suit, it is clear that, in the first case, the plaintiff sued Inderkumari as a childless widow, and thus without any title, and was met by the answer that she had a title as the next of kin of her brother.

But in this case, after the death of Inderkumari, the plaintiffs sue, as sisters' sons, to obtain possession of lands held by the defendant as an alleged adopted son. Besides this, I think that the cause of action may be seen in another point of view, *viz.*, when the plaintiffs sued Inderkumari, there was no question of the right of the adopted son ; but in this case, the contest against the plaintiffs' claim is on the question of the right of the adopted son. Another question which was raised in the second issue of fact, accepted by both the parties, was whether, after the death of Sitaram, Mussamat Inderkumari only held subject to the plaintiffs' reversionary right, or whether the right of inheritance was declared. Now the right of inheritance which was claimed in the former suit was that of Inderkumari, whereas that claimed in this suit is that of the adopted son. In fact, this issue of the right of the adopted son could not be raised and tried in the former suit at all.

Taking then the plaint, the issues, and the judgment in the previous suit, I cannot think that the causes of action in the two suits are the same.

We have heard at great length a good deal of argument on matters outside of these decisions, but we do not think that the pleader had any right to go beyond them. The observation was

made by the Court during the argument, and I think it right to repeat it here.

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I have to add one other point which was raised, but not seriously pressed, by the pleader for the respondent, *viz.*, that there was a decision on the merits.

I have carefully read the judgment twice over. The whole is in substance one argument put in different ways, and when we read the whole, it is clear that the lower Court begins with section 2, continues its argument on section 2, and ends with holding that section 2 bars the plaintiff's suit. But the respondent contends that, by an order of the 4th August 1869, the defendant has been allowed a certificate and declared *locum teneus* of Mussamat Inderkumari.

In the first place, I think, that the plaintiff's suit against Inderkumari claiming as heir of her brother is one thing, and that against the adopted son claiming as heir of his mother is another: but irrespective of that, I cannot subscribe to the doctrine that a miscellaneous order granting a certificate, or declaring one person *locum tenens* of another can, taken by itself be considered any decision of title on the merits, so as to be adduced as evidence in this case; and when we consider that the whole of the substantial part of the decision of the lower Court has proceeded on the argument of the plea in bar, and that this remark as to the substitution of the parties appears only as an incidental remark, I have no doubt that the lower Court did not decide the case on the merits.

Holding then on the grounds above stated that the decision of the lower Court on the plea in bar is wrong, I would reverse it, and remand the case for re-trial.

MARKBY, J.—I also think that the decision of the Judge is wrong. The point for our decision is very short, *viz.*, whether, in consequence of the provisions of section 2, Act VIII of 1859, the lower Court ought not to take cognizance of this suit.

The suit is to recover possession of property which the plaintiff claimed by right of inheritance of one Sitaram.

The defendant who is in possession claimed the property as the adopted son of Inderkumari, who, as sister of Sitaram, had been in possession of the property ever since his death.

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The Judge of the Court below has raised a variety of issues which he calls issues of law and issues of fact, but only one of those issues of law which he tried (except an unimportant one as to the value) is the one which arises under section 2.

I may observe that section 3 has also been referred to by the lower Court, but that seems to be an error.

The Court below has held it right not to take cognizance of this suit, because of the decision in a suit No. 150 of 1864, in which the present plaintiff was also plaintiff, and Inderkumari Dai, the defendant. In that suit this issue was raised: "As alleged by the plaintiffs, is the assertion that the plaintiffs are entitled under the Hindu law current in the Behar district, to inherit after the death of their maternal uncle, Sitaram, the property left by him, true, or as alleged by defendant, Inderkumari Dai, is the plea that a sister's son is not entitled, under the Hindu law current in Benares and Mithila, to inherit so long as she is alive, correct?"

The Court found upon this issue that the plaintiff was not entitled to obtain possession so long as Inderkumari was alive; but that he was entitled to that property after her death, and gave the plaintiff a declaratory decree to the effect.

That decree came up to this Court in regular appeal by the defendant who contended that the suit ought simply to have been dismissed. It appears that that appeal was disposed of on one objection only, and I have not the least doubt that the one objection upon which the appeal was disposed of was that taken in the last ground of the grounds of appeal then filed, viz., that an action merely for the declaration of a contingent right could not lie, and that consequently the decree of the lower Court was illegal, and I am quite clear that the contention there was that the lower Court, as was obviously the case, ought not to have gone beyond the question, whether the plaintiff's present right to recover possession from Inderkumari was proved, and that on failure of that proof, it had simply to dismiss the plaintiff's suit.

The question is whether the lower Court is right in saying that that decision bars the cognizance of this suit. I will not attempt to define what is meant by the terms "cause of action" in

section 2 (1). I have never yet been able to arrive at any accurate definition of that term either as used in section 2 of the Civil Procedure Code, or in section 1 of the Limitation Act, but I think it clear that at any rate this suit ought to have been tried, and that its cognizance is not barred if the plaintiff can arrive at a result favorable to himself, without bringing himself in direct conflict with the decision in the former suit. I take it that all that the former suit decided was that the plaintiff had no right of present possession in 1864. It seems to me that it was perfectly open to the plaintiff to allege and to prove if he could that since 1864 some new title had accrued to him, and the only question is as to whether he did allege that. If he did, I think he should be allowed an opportunity of proving his allegation. To determine that point, it is not necessary to go beyond the second issue of fact raised in this case. It seems to me that, comparing this issue with the statement made in his plaint, it is clear how the issue arose ; for in the plaint, the plaintiff distinctly says that his cause of action arose on the death of Inderkumari, and I have no doubt that one question which the plaintiff intended to raise was that whatever interest Inderkumari may have had in 1864, that interest was only a limited interest ; that it expired at her death ; and at her death the estate came to the plaintiff.

The simple question is, did the plaintiff allege a new title ? If he did, I think it would be perfectly possible to arrive at a decision in favor of the plaintiff, without in the least raising any conflict with the previous decision in 1864. I think therefore that this suit ought to be tried.

This decision leaves entirely open the question which may arise, whether independently of section 2, some of the questions which arise in this suit have not been settled between the parties and cannot now be re-opened, but I am at present confining myself entirely to the question under section 2, *viz.*, whether the cognizance of the suit is barred by reason of the decision in

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(1) The expression " cause of action " together constitute the plaintiff's right in section 18 of the English Common Law to maintain the action"—*Allhusen v. Procedure Act, 1852*, is defined by Black- *Malgarejo*, 3 L. R. (Q. B.), 343.
burn, J., to mean " all the facts which

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1864, and I think that, as the plaintiff alleges not the same title which he alleged in that suit, but one which accrued to him since the death of the defendant in that suit, it is not so barred. We think the appellants must get their costs of this appeal.

Appeal allowed.

Before Mr. Justice Bayley and Mr. Justice Markby.

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July 5.

MAHOMED ABDUR RAHIM AND OTHERS (DEFENDANTS) v. BIRJU SAHU AND OTHERS (PLAINTIFFS).*

Pardanashin—Suit to close Windows.

The defendants having opened certain windows and erected a verandah in their house which commanded a view of the plaintiffs' female apartments, the plaintiffs brought a suit against them to have the windows closed and the verandah removed. *Held*, that no such suit was maintainable.

THIS was a suit to close three windows in the upper apartment, and two doors in the lower apartment, and to demolish a newly erected verandah in the house of the defendants. The suit was "laid at rupees 60, being the damages for intrusion upon the privacy of the defendants' house, and at rupees 20, being the costs for demolishing the verandah, and closing up of the windows and door; in all at rupees 80." on the ground that the verandah and windows commanded a view of the female apartment of the plaintiffs and that it was an invasion of their privacy.

The defence set up was that the women of the plaintiffs' family were not *pardanashin*, and that if the defendants' house did command a view of the plaintiffs' female apartment, it could not, and did not, affect their respectability.

The Moonsiff held that as the plaintiffs had not suffered any injury on account of obstruction to light or ventilation, the plaintiffs were not entitled to the relief prayed for; that the plaintiffs had the remedy in their own hands to secure privacy to their house,—*viz.*, by raising their wall, or by other means to screen their house from the view of the windows; that the

* Special Appeal, No. 177 of 1870. from a decree of the Subordinate Judge of Patna, dated the 30th September 1869, reversing a decree of the Moonsiff of that District, dated the 20th January 1869.

plaintiffs were *sunis*, and that their women were not *pardanashin*. He, accordingly, dismissed the plaintiff's suit.

On appeal, the Subordinate Judge held that the females of the plaintiff's family were *pardanashin* women; and that, according to the usage of this country, "if the privacy of any house occupied by *pardanashin* women be intruded upon, the parties thus injured could lay claim to the removal of such injury." He, accordingly, passed a decree, ordering the three windows of the upper apartment to be closed; and that the verandah be so screened as to prevent an exposure of the female apartment of the plaintiffs; and that, in default thereof, the verandah should be demolished.

Mr. Piffard (Baboo Budh Sen Sing with him), for the appellants, relied upon a decision of STEER and L. S. JACKSON, JJ., in *Teekun Lall v. Sheo Churn* (1) dated the 18th June 1862; a decision in *Ramlal v. Mahes Baboo* (2); *Manishankar Hargovan v. Trikam Narsi* (3); *Kuvarji Premchand v. Bai Javer* (4).

(1) Unreported.

(2) Before Mr. Justice Phear and Mr. Justice Hobhouse.

RAMLAL v. MAHES BAROO.*

The 2nd September 1868.

THIS suit was instituted on 29th January 1867. The plaintiff prayed that the defendant might be compelled to remove certain windows which he had put into the second story of his house, overlooking the apartments occupied by the females of the plaintiff's household.

The defendant stated that the windows complained of were made in the year 1866. The first story of his house was built in 1867, and was surmounted by a terrace which had been used by the members of his family, overlooking the house of the plaintiff; that the plaintiff had made no objection to the windows, and was in fact not inconvenienced by

them. The Court of first instance dismissed the plaintiff, and the Principal Sudder Ameen upheld the decision. In the course of his judgment he referred to Broom's Legal Maxims, page 367, where it is said "an action does not lie if a man build a house whereby my prospect is interrupted or open a window whereby my privacy is disturbed; in which latter case the only remedy is to build on the adjoining land opposite to the offensive window." Reference was also made to pages 368, 369 of the same work.

Plaintiff appealed to the High-Court.

PHEAR, J.—We think there is no legal right shown in this case, of the infringement of which plaintiff is entitled to complain.

(2) 5 Bom. H. C. Rep., 42.

(4) 6 Bom. H. C. Rep., 143.

* Special appeal, No. 916 of 1868, from a decree of the Principal Sudder Ameen of Patna, dated the 11th January 1868, affirming a decree of the Sudder Moonsiff of that District dated the 28th May 1867.

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1870 *Munshi Mohamed Yusaf*, for the respondents, relied upon
 MAHOMED *Sreenath Dutt v. Nand Kishore Bose* (1), and a decision of
 ABDUR RAHIM *KEMP and SETON-KARR, JJ.*, dated 10th August 1865 (2).
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The judgment of the Court was delivered by

MARKBY, J.—In this case the plaintiffs and defendants were owners of two houses separated by a narrow lane, but whether public or private does not appear. The defendant's house consisted originally of one story, and he built a second story with three windows looking towards the plaintiff's house into the lane. The defendants also built a verandah, one end of which looked in the same direction. The object of the plaintiffs in bringing this suit was to compel the defendants to close these windows, to pull down the verandah, and also to close two doors in the lower story.

The Moonsiff held that the suit could not be maintained; that the mere fact that the females of the plaintiffs' house could be seen from the defendants' house did not give the plaintiffs a right of suit; and that if the plaintiffs were annoyed thereby, they had the remedy in their own hands by raising their walls or erecting a screen.

The Subordinate Judge thought otherwise. He considered that "if the privacy of any house occupied by *pardanashin* women was intruded on by the erection of another house, the party thus injured could certainly lay claim to its demolition."

The only question brought before us on this special appeal is whether or no the suit can be maintained. The appellants arguing against the maintenance of the suit, rely on a decision of STEER and L. S. JACKSON, JJ., of the 18th June 1862. In that case the Moonsiff held that the suit would lie, but the Judge of Patna held that it would not. The Sudder Court upheld the decision of the Judge, saying: "We are not aware that where two owners of houses live contiguous, but separated by an intervening space, the custom of the country requires that neither party shall make any improvement on his property, if such improvement has the effect of depriving the other of a certain

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"degree of privacy. We should rather say that where the one
"opens a window which overlooks the other, it is the custom
"of the country that the other raises a screen or adopts some
"other contrivance to counteract the effect of the opening made
"in his neighbour's house."

The appellants also rely on a decision of PHEAR and HOBHOUSE, JJ., *Ramlal v. Mahes Baboo* (1). There, both the lower Courts in Patna held that the suit could not be maintained. The Principal Sudder Ameen said: "It appears that the plaintiff complains of *be-parda-zee*,—that is, his females are seen from the windows in question. If that be the case, the remedy is in his own hands. He can build a wall or put up screens of mat or any other materials in order to prevent the inmates of the house being seen by men from the windows. It is evident, therefore, that by the acts of the defendant, the plaintiff's right to the enjoyment of light and air has not been invaded, nor has the defendant done any act by which an actionable wrong has been created." This Court said:—"We think that there is no legal right shown in this case, of the infringement of which the plaintiff is entitled to complain."

The appellants also refer to two cases—*Manishankar Hargovan v. Trikam Narsi* (2); *Kuvarji Premchand v. Bai Javer* (3), in which the suit was maintained, but on the express ground of a local usage in Guzerat.

The respondents, on the other hand, rely on *Sreenath Dutt v. Nand Kishore Bose* (4), where the Court (BAYLEY and PUNDIR, JJ.) say:—"We further notice that the plaintiff is said to have built an upper-story to his house, overlooking the inner apartments of the defendants. Defendants on this built the wall, which, it is said, deprived plaintiff of light and air. Even if it were shown that light and air had long been enjoyed by the plaintiff, and have now been cut off by defendants wall, still as plaintiffs had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the

(1) *Ante*, p. 677.

(3) 6 Bom. H. C. Rep., 143.

(2) 5 Bom. H. C. Rep., 42.

(4) 5 W. B., 208.

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"defendant's family, the plaintiff could have no relief in this respect, as he was the first and greater wrong-doer."

They also rely on a decision of KEMP and SETON-KARE, JJ., of the 10th August 1865 (1), which is in these words :—" We see " no reason whatever to interfere in this case. Both the Judges " of the lower Courts have visited the spot and have satisfied " themselves that the opening of the windows complained of is " a violation of the privacy to which the plaintiff has a right. " There is nothing contrary to law in this finding, and it is cer- " tainly in conformity to the usage of the country."

There is also said to be a decision in the Agra High Court Reports of 1867, that the suit can be maintained, but the pleaders have not been able to show us the case in the Reports (2).

In *Komathi v. Gurunada Pillai* (3) the Madras High Court held that there was no " right of privacy," but the question, for reasons which do not appear upon the face of the judgment, was discussed with reference to European and not with reference to Hindu or Mahomedan law.

It is remarkable that, in the cases in which the right is upheld, nothing is said of gaining by prescription a right to prevent your neighbour from building his house so as to overlook your premises, but the " right of privacy" is spoken of as if it were an inherent-right of property, and the invasion of privacy is spoken of as something like a trespass. And in the present case the Subordinate Judge considers that intrusion on the privacy of female apartments is an " injury" which the law will prevent.

It seems to me impossible to support this view. That privacy is of the utmost importance I can well understand; and that the law should lay down rules to prevent that privacy being wantonly and unnecessarily invaded, would be also intelligible. But to hold that privacy is a *right*, and the invasion of it an *injury*, would lead, as it appears to me, to the most alarming consequences to the owners of house property in towns. By erecting female apartments a man would prevent his neighbours

(1) Unreported.

(3) 3 Mad. H. C. Rep., 141.

(2) See *Goor Dass v. Manohur Dass*.

2 Agra H. C. Rep., 269.

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building as they wished on property situate at a very great distance, and the erection of such apartments by two or three different persons might render all the surrounding land useless for habitation. But though this is the ground of the Subordinate Judge's decision, it is not necessary to go so far in order to maintain this suit. For instance, a right exists by express enactment in France, that a window should not be opened within a distance of six feet from a neighbour's property, and such a right might exist by usage in this country. But it does not appear that it is so, or that there is anything analogous to it. The only right which I find anywhere set up here is this supposed "right of privacy," and that is a right which, in my opinion, cannot exist at any rate independently of prescription or grant or express local usage.

With regard to the case of *Sreenath Dutt v. Nand Kishore Bose* (4), I wish to guard myself carefully from saying that I should dissent from the proposition there laid down. I think that the opening of new windows affecting a neighbour's privacy may very possibly give him a right, according to the usage of the country, of protecting his privacy by any erection which he chooses to put upon his own land; and that the person who has opened these new windows cannot complain that such erection interferes with his light and air. That is a very different question from the present, and does not arise here.

I agree with the Moonsiff that it is much more reasonable that the plaintiffs should protect themselves than that they should prevent the defendants improving their houses. I think he was right in holding that the suit could not be maintained, and in dismissing the suit. I think the decision of the Subordinate Judge ought to be reversed, and the suit dismissed, the plaintiffs paying one set of costs in all the Courts.

Judgment reversed.

[ORIGINAL CIVIL.]

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March 21.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Norman.

HIRALAL MULLICK (PLAINTIFF) v. MATILAL MULLICK
AND OTHERS (DEFENDANTS).

Relief—Prayer for General Relief.

See also
14 B.L.R. 338.

Under a prayer for general relief, a plaintiff is not entitled to any relief which is inconsistent with his plaint; therefore, where a plaintiff brought a suit to set aside his father's will, on the ground that he had no power to dispose of his property, but that the plaintiff was entitled as eldest son and heir-at-law according to Hindu law, the suit should have been dismissed with costs, and no account should have been decreed to the plaintiff in respect of his interest in a portion of the property, the bequest of which was, in the opinion of the Court below, void for remoteness.

This suit was brought by the eldest son of Dwarkanath Mullick, deceased. The plaint set out that the deceased died leaving the plaintiff, his eldest son and heir-at-law, and other sons and daughters, and considerable property; that the deceased made his will (which was recited), and thereby left all his property to others than the plaintiff, with the exception of a small sum for maintenance.

In the will was the following provision :—

“ The residue of my personal estate and moveable property, after making the payments above mentioned, shall be divided into six equal parts, and one of such equal parts shall be paid and transferred to each of my five younger sons, Matilal Mullick, Chunilal Mullick, Ramlal Mullick, Lutulal Mullick, and Girish Chandra Mullick ; and the remaining one equal sixth part shall be retained by my executors, and the income thereof accumulated and invested in Government securities, until the son or sons of my eldest son, Hiralal Mullick, if he shall have any son, shall attain full age, and shall thereupon be paid and transferred to such son or sons if more than one, in equal shares ; but no such payments or transfer shall be made to such son or sons, until the youngest of them, if more than one, shall have attained his full age ; and in case no son be born of my said eldest son, Hiralal Mullick, or no son shall attain full

age, then the last mentioned sixth equal part of my residuary personal estate shall, on the death of the said Hiralal Mullick, be divided equally among such of my other five sons as shall then be living, and the male issue of such of them as shall then be dead ; the male issue taking the share of a deceased son."

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It was further stated in the plaint as follows :

" That the plaintiff submits that the Hindu laws regulate and dispose of the succession to landed and immoveable property of all deceased Hindus : and that by such laws, the said Dwarkanath Mullick could not legally or validly make any will to affect the ancestral landed and immoveable property, of which he was possessed at the time of his death, to the prejudice of the plaintiff, or in derogation of his rights ; and the plaintiff further submits that the said will is void in law, and that the bequests made therein to plaintiffs prejudice are not valid. Plaintiff submits that, notwithstanding the said will, plaintiff is entitled under the Hindu law to all such ancestral immoveable property and to all landed property acquired by his father by the use of the rents and profits of such ancestral immoveable property ; and that plaintiff is also entitled to the said moveable and personal property, or to a share or portion thereof. But should this Honorable Court consider such will not controlled, and not rendered nugatory and of no effect, by the laws of Hindus, as is above respectfully submitted, then plaintiff further submits that the testator has in the said will created perpetual trusts and perpetuities in reference to the landed or immoveable property, as also in reference to most of the personal or moveable property dealt with in the said will ; and that the several devises and bequests of such property are also void in law for remoteness and uncertainty ; and that all the said bequests are contrary to public policy and contrary to Hindu as well as to English laws, and that the said Dwarkanath Mullick has, in respect of said landed and immoveable property, and to the greater part of the said moveable property, died intestate, and that plaintiff is entitled to the ownership, as the eldest son of Dwarkanath Mullick, and to the possession of all said landed property, and to a share or portion of the said immoveable property.

" That the plaintiff submits that, as far as the said will purports or professes to pass any ancestral estate of the said Dwarkanath

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Mullick away from the plaintiff, it is wholly void ; and that the limitations sought to be created by the said will are inoperative and void, and cannot take effect. The plaintiff also submits to this Honorable Court that he is also entitled to a share of the personal property of which the said Dwarkanath Mullick died possessed, and that the bequests of the same are void in law.

“ That the plaintiff submits that, in case the said will is valid to any extent, then plaintiff is entitled to a share of all the said properties, to reasonable maintenance out of the said estate ; and that the maintenance mentioned in the said will is insufficient ; and that the plaintiff is entitled to be paid, pending this suit, the maintenance mentioned in the said will, without prejudice to his right to maintain and continue this suit to set aside the said will as aforesaid.

“ The plaintiff prays as follows :—

“ *Firstly.*—That it be declared that the testator had no absolute power of disposing by will of his entire estate, and particularly of his ancestral estate, to the exclusion of the plaintiff, and that it be declared that the plaintiff as eldest son or heir-at-law is entitled to the same.

“ *Secondly.*—That it be declared that the trusts and limitations in and by the said will declared, in reference to the immoveable and landed estate of the said testator, and in reference to the residue of his personal estate, are wholly void and invalid ; and that the plaintiff is entitled to the said landed estate and immoveable property, and to the residue of the said personal estate discharged from the trusts and devises, and the bequests thereof in the said will mentioned ; and that it be declared that the testator has died intestate in respect to the said landed estate, and in respect of the said residue of his personal estate and immoveable property ; that in case the Court be of opinion that the plaintiff is not entitled to the relief above asked for, it may be declared that he is entitled to a more adequate maintenance than that specified in the said will ; and that the amount of such maintenance be ascertained by the Honorable Court, and the payment thereof directed out of the estate of the said testator ; and that, in the meantime, and whilst this suit and plaint is being decided upon by this Honorable Court, the plain-

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tiff may have maintenance assigned to him of such amount as this Honorable Court may see fit to order ; and further that, pending this suit, and if necessary, a receiver be appointed to receive the rents, issues, and profits of the said immoveable property, and to collect and manage, and pay into Court, to the credit of this suit, the said moveable property, or that part thereof which has not been validly bequeathed by the said will, and to which the plaintiff is entitled.

*“ Thirdly.—*And that the plaintiff may have such other and further relief in the premises as to this Honorable Court shall seem meet, and the facts and justice of the case may require.”

In this written statement, the plaintiff stated that he adopted his plaint as part of his written statement, and he further submitted, that if he (the plaintiff) “ be not entitled as eldest son to the property of his father which may be held not to be validly disposed of by the said will, then that, at all events, he is entitled to a share thereof, both of moveable and immoveable property.”

And the plaintiff further stated, that he should submit to the Court that he was entitled to have an account from the executors.

The defence was that the plaint disclosed no cause of action ; that the eldest son is not heir according to Hindu law, but that the sons succeed jointly, unless, as was done by the father’s will in this case, the father has otherwise disposed of his estate ; that the defendants took possession of the testator’s property as executors, and are in possession as such ; and that the will was good and valid.

Issues were fixed ; and the following decree was made by PHEAR, J., on 4th January 1870 :

“ It is declared that this suit, so far as it seeks to have it declared that the testator in the pleadings named had no absolute power of disposing by his will of his entire estate to the exclusion of the plaintiff, and that the plaintiff as eldest son or heir-at-law is entitled to the same, and also so far as it seeks to have it declared that the plaintiff is entitled to a more adequate maintenance than that specified in the will of the said testator, be, and the same is hereby, dismissed. And it is declared that the gifts of the interest on the Government Securities, specifically mentioned in the said will of the said testator, to his three daugh-

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ters for life, are good and valid in law, and that the other gifts of the moveable property to living persons are also good and valid in law. And it is further declared, that the direction in the will of the said testator to accumulate the income of one-sixth part of the residue of his moveable property and the other directions for the disposition both of the income and corpus of such one-sixth part of the residue of the said moveable property are void in law. And it is further declared that the said one-sixth part of the residue of the said moveable property is undisposed of by the will of the said testator, and that the plaintiff, as one of the sons of the said testator, is entitled to one equal sixth part thereof, and that the other sons of the said testator are entitled in equal shares to the remaining five equal sixth parts thereof. And it is further declared, that the said will, except as to the directions hereinbefore declared invalid, ought to be established and the parts thereof performed, and doth order and decree the same accordingly; and it is ordered and decreed that the defendants, the executors and trustees of the will of the said testator, do, out of the one-sixth of the estate of the said testator, pay to the plaintiff his costs of this suit (to be taxed by the Taxing Officer of this Court under the heading "Class 2, Ordinary Causes") with the interest thereon at the rate of 6 per cent. per annum from the date of taxation to the date of realization."

In the judgment upon which the decree proceeded were the following passages:—

PHEAR, J.—I need hardly say that the claims preferred by the plaintiff, under the first and second heads of his prayer, must have been framed in ignorance of the fundamental principles of Hindu law with regard to inheritance. The mistake which is thus made so seriously affects the plaintiff's cause of action against his brothers, that I cannot help thinking it is matter to be regretted that the plaint was allowed to be filed in its existing form.

The written statement, too, of the plaintiff is irregular, for it is not so much a statement of the facts upon which the plaintiff relies for the support of the cause of action disclosed in the plaint, as it is a correction of the plaint itself, in regard to the faulty particular to which I have just referred, together with a further

claim to relief additional to those contained in the prayer. In truth, it is essentially an amendment of, and addition to, the plaint.

On this basis, however awkwardly composed as it is, issues have been framed and fully argued before me. My present decision, therefore, ought not to have reference to anything outside the matters of dispute thus raised. * * * *

As to costs, I must adhere to the usual rule, and the plaintiff must have all his costs out of the estate, for I don't see how I can separate from the bulk any portion of costs and say that they are attributable to the faultiness of the plaint and written statement of the plaintiff.

From this decree the plaintiff appealed.

Mr. *Creagh* (Mr. *Macrae* with him) for the appellant, referred to the *Dayabhaga*, Chapter I, section 36, and Chapter III, section 15, to show that the plaintiff, being the eldest son of the testator, was not wrongly described as his heir-at-law; and contended that the devise of one-sixth of the personal property was void for remoteness, and that the appellant was entitled to a sixth part of that one-sixth.

Mr. *Kennedy* and Mr. *Branson* for the respondent were not called on.

PEACOCK, C. J.—This suit is brought by Hiralal Mullick to set aside the will of his father, Dwarkanath Mullick, and it is framed upon the ground that the plaintiff is the eldest son and heir-at-law according to Hindu law, of his father. It appears to me to be clear beyond all doubt that, according to Hindu law, the eldest son is not the heir-at-law of his father, nor do the authorities which have been cited by Mr. *Creagh* from the *Dayabhaga* show that the plaintiff can be looked upon or treated as the heir-at-law of his father.

After setting out the will of the testator, the plaintiff submitted that the will was not valid; but that if it was valid to any extent, then the plaintiff was entitled to reasonable maintenance.

Now the first prayer in the plaint is, "that it be declared that the testator had no absolute power of disposing by will of his entire estate to the exclusion of the plaintiff." I have no hesi-

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tation in stating that, in my opinion, the plaintiff is not entitled, in point of law, to any such declaration.

It then proceeds "that it may be declared that the trusts and limitations in and by the said will declared, in reference to the immoveable and landed estate of the said testator, and in reference to the residue of the personal estate, are wholly void and invalid; and that the plaintiff is entitled to the said landed estate and immoveable property, and to the residue of the said personal estate discharged from the trusts and devises, and the bequests thereof, in the said will mentioned; and that it be declared that the testator died intestate in respect of the said landed estate, and in respect of the said residue of his personal estate and immoveable property."

There can be no doubt that the meaning of that prayer is, that it may be declared that the testator died intestate, upon the ground that he had no power to make a will, and not on the ground that any portion of the devise, in respect of the moveable property, was bad for remoteness.

The plaintiff then prays that "it may be declared that he is entitled to a more adequate maintenance than that specified in the said will, and that the amount of such maintenance be ascertained by this Honorable Court, and the payment thereof directed out of the estate of the said testator; and that, in the meantime, and whilst this suit and plaint is being decided upon by this Honorable Court, the plaintiff may have maintenance assigned to him."

The third prayer is "that the plaintiff may have such other and further relief in the premises as to this Honorable Court shall seem meet, and the facts and justice of the case may require."

The question is whether, under the prayer for general relief, looking to the plaint as filed, contending that the testator had no power to make a will, and that he died intestate, the plaintiff is entitled to have an account taken of the personal property, on the ground that the devise of one-sixth of the personal property to accumulate until the son or sons of the plaintiff, if he shall have any son, shall attain full age, is bad for remoteness.

On the appeal being preferred, an objection was made by the respondent that the decree ought not to have declared the will

to be valid with the exception of the particular bequest as to one-sixth of the personal property.

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I take it that, under a prayer for general relief a plaintiff is not entitled so any relief which is inconsistent with his plaint. Here the plaintiff says in his plaint that his father had no power to make a will; but it is now contended that the will being valid, the devise of one-sixth of the personality is bad on the ground of remoteness, and that therefore the plaintiff is entitled to one-sixth of that one-sixth.

In Story's Equity Pleadings, paragraph 40, it is said :—" The usual course is for the plaintiff in this part of the bill to make a special prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer for general relief at the discretion of the Court; the latter can never be properly and safely omitted; because, if the plaintiff should mistake the relief to which it is entitled in his special prayer, the Court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill."

In paragraph 41 of the same work it is said " that it has been said that a prayer of general relief, without special prayer of the particular relief to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief which the case requires may at the hearing be prayed at the bar. This, a general rule, may be true; but it is not universal. Thus, for example, an injunction will not ordinarily be granted under prayer for general relief; but it must be expressly prayed, because the defendant might, by his answer, make a different case under the general prayer from what he would if an injunction were specifically prayed."

Paragraph 42 says :—" But even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the Court will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially, if the defendant may be surprised or prejudiced thereby. Thus, if a bill is brought for an annuity or rent charge of £10 per annum left under a will, and the counsel for the plaintiff

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"pray at the bar that they may drop the demand of the annuity or rent charge, and insist upon the land itself out of which the annuity or rent charge issues, the Court will not grant it ; for it is not agreeable to the case made by the bill."

The plaint in this case being to declare that the testator had no power to make a will, and to declare that he died intestate, it is now contended that the will is good, except as to the bequest of one-sixth of the personal property. The decree declares that the will is valid, except as to that bequest ; whereas the plaintiff's prayer was to have the will set aside altogether. It appears to me therefore that, under the prayer for general relief, the plaintiff is not entitled to have an account taken of the personal estate, in order to ascertain the portion of the personal estate to which he would be entitled as one of six sons, that is, to see whether he is entitled to one-sixth of one-sixth, or one-thirty-sixth part of the personal property. I think that the decree ought not to have decreed an account of the personal property, but that it should have dismissed the plaintiff's suit altogether.

It appears to me then, on the whole of this case, that, as the plaintiff has not made out his case that his father was not entitled to dispose of his property, whether ancestral or self-acquired, or that he, as the eldest son, is entitled as heir-at-law to succeed to the property, his suit ought to have been dismissed, and that an account ought not to have been ordered of the personal property, in order to find out what was the plaintiff's one-sixth of the one-sixth share of that property which was devised to the plaintiff's eldest or other son.

Then the question arises whether the plaintiff, having brought a suit on the ground that he was entitled, as the eldest son and heir-at-law, to succeed to the property, and having failed in his suit, has a right to charge the estate with the costs of this suit. I am clearly of opinion that he had no such right, and that his suit having altogether failed, he should pay the costs of this unnecessary litigation. I also think it clear that the plaintiff is not entitled to any higher maintenance than that which has been awarded to him in the will.

The decree of the learned Judge will therefore be amended,

by dismissing the suit of the plaintiff with costs. The plaintiff will also pay the costs of this appeal.

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Decrees amended.

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Attorney for the appellant : Baboo Girishchandra Ghose.

Attorney for the respondent : Mr. Thomas.

[FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

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Official Assignee—Vesting Order—Sale in Execution of Decree—Auction purchaser—Priority—Act XXIII of 1861, s. 15—Act VIII of 1859, ss. 221, 232, 240, 242, and 331—Insolvent Act (11 & 12 Vict., c. 21), ss. 7 and 49

In September 1867 A. obtained a decree against B., and on 12th January 1868 caused a piece of land to be attached in execution. On 17th April 1868 it was sold by order of the Zilla Judge, and bought by C. Before this, however, the judgment-debtor B had filed his petition in the Insolvent Court and on the 6th March 1868 a vesting order was made. On 24th July 1868 the Official Assignee sold the premises by the order of the Insolvent Court.

See also
15 B. L. R.
App. 13.
13 B. L. R. 207

The purchaser at the last mentioned sale now sued to recover the property from the purchaser at the sale in execution of A.'s decree.

*Held, per COUCH, C. J., BAYLEY, KEMP, and JACKSON, JJ.,—*that the vesting order passed the property to the Official Assignee, subject to being divested by a sale in execution of the decree; that the sale in execution by order of the Zilla Judge was legal, notwithstanding the vesting order; that the purchaser at the sale in execution of the decree acquired a good title to the property, and the purchaser at the sale by order of the Insolvent Court had no right to recover it from him. The attaching creditor had a right to have the attached property sold, and the money realized by the sale paid to him.

Per PHEAR, J.—The jurisdiction of the Zilla Judge to order the sale was not affected by the vesting order; but before making the order for sale, the Official Assignee should be heard; and unless special reason be shown, upon the Official Assignee's application the execution proceedings should be stayed or set aside. In the present case it must be assumed that the Judges made the order for sale in due course, and consequently that sale operated to pass the property out of the hands of the Official Assignee into those of the auction-purchaser.

THE question in this case was referred to a Full Bench, under

* Regular Appeal, No. 193 of 1869, from a decision of the Subordinate Judge of the 24 Pergunnas, dated the 25th May 1866.

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the following order of reference by L. S. Jackson and Glover, JJ., who stated the facts on which the question referred depended.

JACKSON, J.—I think this case must go to a Full Bench. The question is a simple one. The defendant Inderchand Dugur had got a decree, in September 1867, against Tarachand and others, and in the month of Magh 1274, or 12th January 1868, caused a piece of land with a house standing on it, to be attached with a view to sale in execution of his decree, and it was sold accordingly on 17th April by order of the Zilla Judge and bought by the other defendant, Anand Chandra Pal. In the meantime the judgment-debtors had filed their petition in the Insolvent Court, and a vesting order was made on the 6th March 1868.

The official Assignee afterwards sold the premises, by order of the Insolvent Court, on the 24th July of the same year. The present plaintiff was the purchaser, and sues to recover the property from the purchaser at the Zilla Court's sale.

Does the vesting order prevail over the previous attachment made after decree, so as to give the plaintiff a better title than the defendant?

The Court below, on the authority of *Indra Chandra Dogar v. Tarachand Dogar* (1), and *Rampersaud v. Callachund Doss* (2), held that it does, and has given judgment for the plaintiff.

But the same point (or nearly so) was very carefully considered by four Judges of the High Court at Bombay, in *Gamble v. Bholagir* (3), and it was there unanimously held that the attaching creditors who had obtained warrants in execution, were entitled to preference over the Official Assignee, whose vesting order was of date subsequent to such warrants, though before sale.

In those cases there had been attachments previous to judgments, and it seems to have been argued that as there was no re-seizure by the Nazir, the property was merely detained under the first attachment, and it seems hardly to have been contended

(1) 2 B. L. R., A. C., 61.

(3, 2 Bom. H. C. Rep., 150.

(2) 1 Ind. Jur., N. S., 325; S. C., on

Appeal, Id, 373.

that the Official Assignee could have any case if the attachment had been after decree and previous to the vesting order.

The Court, however, held that re-seizure was unnecessary, and that the sale under the decree prevailed.

I incline to think that those cases in Bombay were rightly decided, and that the judgment in this suit ought to be reversed, and therefore I propose to send the case before a Full Bench.

GLOVER, J.—I adhere to the opinion I expressed in the case of *Indra Chandra Dogar v. Tarachand Dogar* (1), a case which is exactly similar to the present one.

I have, however, no objection to the matter being referred to a Full Bench, and I therefore concur in the reference proposed by Mr. Justice Jackson.

Mr. Piffard (Mr. Paul with him) for the appellant.

Mr. Woodroffe for the respondent.

Before the argument commenced, COUCH, C. J., observed that the case of *Gamble v. Bholagir* (2) must not be taken as in any way deciding the point before the Court. In that case the point now in question had not been argued. He was one of the Judges who had decided that case; counsel on both sides appeared to take it for granted that an attachment after judgment would bind property against the Official Assignee, but the Court had not decided that question.

Mr. Piffard.—The Official Assignee merely steps into the insolvent's shoes and takes the dominion over the insolvent's estate which the insolvent himself had, together with a certain limited power of setting aside or treating as null certain dispositions of the insolvent's property voluntarily made by the insolvent within a certain period before his insolvency. The Official Assignee has so far a power superior to that of the insolvent that he can annul alienations of property made fraudulently by the insolvent, which alienation the insolvent himself could not annul on the ground of his own fraud. The contention on the other side will be that the vesting order *ipso facto* puts an end to the attachment, and gives to the Official Assignee dominion.

(1) 2 B. L. R., A. C., 61.

(2) 2 Bom. H. C. Rep., 150.

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over property which had been taken by act of law away from the insolvent before his insolvency, and that the Official Assignee can treat as null and void what should be taken to be a charge on the insolvent's property created not voluntarily, but *in invitum* by act of law. Such appears to be the effect of a series of decisions of this Court and of a recent decision of the High Court at Agra, in *Sarkies v. Mussamut Bundho Bae* (1). But I submit that all these decisions are erroneous, and rest upon a mistaken principle first laid down by Mr. Justice Phear in the case of *Petumber Mundle v. Cochrane* (2). The two principal cases following these decisions are *Rampersaud v. Callachund Doss* (3), and *Roy Chander Roy v. Bampton* (4). The principle which appears to be laid down in these cases, is that an attachment is something, quite different in its effect from the old writ of sequestration, and that goods under attachment are not effected by any sort of lien, but are simply in *custodiâ legis* and not specially for the benefit of the attaching creditor. But this principle is wrong, and the distinction drawn in *Rampersaud v. Callachund Doss* (3), between an attachment and a *fi. fa.* is erroneous. Section 81 of Act VIII of 1859, and the following sections (particularly 81 and 84) show beyond doubt, that an attachment has the same force as a *fi. fa.*, and that the only difference between an attachment before judgment, and a writ of sequestration is that the latter could be used so as to defeat the rights even of *bonâ fide* judgment-creditors, while by section 89 the rights of third parties are saved; but it is absurd to use this section as it has been used on behalf of the Official Assignee. The right saved are rights existing at the time of the attachment, not rights derived in any way from the defendant subsequently to the attachment. The point, which I think is substantially the point before the Court, was first decided by Mr. Justice Macpherson, in an *ex parte* case referred to in *Rampersaud Callachund Doss* (3), in favor of the view which I now support, that an attachment before judgment, and an attachment after judgement are equally efficacious against the

(1) 1 Allahabad H. C. Rep., Pt. VI., 81. (3) 1 Ind. Jus., N. S., 325; S. C., on

(2) 1 Ind. Jur., N. S., 11

Appeal, *Id.*, 373.

(4) 2 Ind. Jur. N. S., 188.

Official Assignee : but when the point again came before him in *Rampersaud v. Callachund Doss* (1), Macpherson, J., resiled from his original opinion, and followed *Petumber Mundie v. Cochrane* (2). This was unfortunately confirmed on appeal, and followed in *Roy Chunder Roy v. Bampton* (3), and other cases. The opinion expressed by Mr. Justice Norman in *Rajchunder Roy v. Isserchunder Roy* (4), is correct, although it was subsequently overruled. Attachment before judgment is, like a writ of sequestration, a penalty, and, as in the case of sequestration, that penalty enures to the benefit of the particular person enforcing it : Smoult's Rules and Orders, pages 211, 212, and cases there cited. Reference was then made to Sections 81, 84, 87, 237, 240, 243, 257, 259, 260 of Act VIII of 1859, and stress laid on the circumstance that sequestration before judgment was not dissolved by insolvency—*Doe d. O'Hanlon v. Pakiologus* (5). Similarly a writ *offi. fa.* in the hand of the sheriff is not made ineffective by insolvency—*Giles v. Grover* (6). A transfer of the judgment-debtor's property to the Official Assignee can (except as stated in the beginning of the argument) have no greater validity than a transfer to executors and administrators after the death of a debtor.

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Section 49 of the Indian Insolvent Act authorizes the Official Assignee to apply in certain cases to stay proceedings in execution, and gives the Court, in which the case is pending, or execution proceedings are being taken, a discretion to stay proceedings accordingly. This section could have no force in the mere fact of a vesting order having been made transferred property to the Official Assignee discharged from attachment.

The following cases were also cited :—*Odes v. Woodward* (7), *Clerk v. Withers* (8), *Bragner v. Langmead* (9), *Waghorne v. Langmead* (10), *Calvert v. Tomlin* (11), *Samuel v. Duke* (12), *Ranken v. Harwood* (13), *Mohunt Naunk Buksh v. Koonwur*.

(1) 1 Ind. Jur., N. S., 325.

(2) *Id.*, 11.

(3) 2 Ind. Jur., N. S., 183.

(4) Bourke, 139.

(5) Morton, 323.

(6) 9 Bing., 128.

(7) Ld. Raym., 850.

(8) Ld. Raym., 1072.

(9) 7 T. R., 20.

(10) 1 B. & P., 571.

(11) 5 Bing., 1; S. C., 2 M. & P., 1.

(12) 3 M. & W., 623.

(13) 10 Ind. Jur., O. S., 794.

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Roy (1), Unnopoorna Dassea v. Gunga Narain Paul (2), Kartick Churn Singh v. Gogaram (3), Ramdhan Mitter v. Kailasnath Dutt (4), Winter v. Gartner (5), Panchanun Bannerjee v. Hurrymohun Sen (6), Woodland v. Fuller (7), Cochran v. Hurrosoondurri Debia (8).

Mr. Woodroffe, for the respondent, relied on *Sarkies v. Mussamut Bundho Bae* (9), *Petumber Mundle v. Oochrane* (10), *In re Gocool Doss Soonderjee* (11), *Rampersaud v. Callachund Doss* (12), *Roy Chunder Roy v. Bampton* (13), *Cochrane v. Gladstone Wylie* (14), *Indra Chandra Dogar v. Tarachand Dogar* (15), and contended that the vesting order having been passed before the sale in execution of the decree of the Zilla Judge took place, the Official Assignee was entitled under the vesting order to possession of the insolvent's property, even though it had been attached in execution of a decree, and an order for sale in execution had been passed.

The opinions of the learned Judges were delivered as follows:—

COUCH, C. J. (after stating the facts and the question referred, continued)—The provisions in the Indian Insolvent Act, 11 and 12 Vict. c. 21 as to the vesting of the estate and effects of the insolvent in the Assignee is similar to the provision in the English Insolvent Act, 1 and 2 Vict.; c. 110, and there is nothing in the Indian Act which can give to the Assignee under it a greater right than the assignee in England has. The vesting order of the Insolvent Debtors' Court, under section 37 of the English Act, has the same legal operation as the assignment to the provisional assignee had for which it was substituted. Now, Lord St. Leonards in *In re Atkinson* (16). in his judgment as Lord Chancellor says:—

“Two questions arise on this appeal: first, whether the

(1) 2 W. R., 62.

(2) *Id.*, 296.

(3) *Id.*, Mis., 48.

(4) 4 B. L. R., A. C., 20.

(5) 1 B. L. R., O. C., 79.

(6) 1 Ind. Jur., N. S., 408.

(7) 11 A. & E., 859.

(8) 6 Moore's I. A., 509.

(9) 1 Allahabad H. C. Rep., Pt. VI., 81.

(10) 1 Ind. Jur. N. S., 11.

(11) *Id.*, 327.

(12) *Id.*, 325.

(13) 2 Ind. Jur., N. S., 188.

(14) *Id.*, 337.

(15) 2 B. L. R., A. C., 61

(16) 2 De G. M. & G., 140.

" title of the Assignee in insolvency is so absolute that it cannot
 " be disturbed, and secondly, what, under the circumstances as
 " they here appear, are the rights of the Assignee for value.
 It may be considered as decided that the Assignee in insol-
 vency represents the insolvent ; he stands in his place and takes
 only such interest as he can give and subject to all equities by
 " which the insolvent is bound. It has, however, been contended
 " that the effect of the Act is so to vest the property that the in-
 " solvent cannot afterwards divest it ; but this is not so, for there
 " are no words in the Act giving to the Assignee any higher
 " interest than the insolvent himself has : the Assignee does not
 " therefore take so as not to be subject to equities as administered
 " in this Court."

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And Lord Westbury in moving the judgment of the House of
 Lords in *Fleming v. Howden* (1) says :

" The right of trustee under a sequestration is very different
 " from the right of a singular successor, for it is a rule common to
 " both English and Scotch Bankrupt Law that the trustee or
 " assignee takes the property of the bankrupt subject to all the
 " rights and equities that affected it at the time of the bankruptcy.
 " But the singular successor is not bound by a trust or duty of
 " which he had no notice. The trustee under a sequestration is
 " in the same position as a gratuitous alienee. He takes such
 " estate or interest only as the bankrupt can lawfully convey. So
 " in England the assignee takes such interest only as the bankrupt
 " can lawfully depart withal. The force of the two expressions is
 " the same, and the implied conveyance to the trustee or assignee
 " ranks no higher than a gratuitous alienation."

No higher authorities could be quoted for the rule which is to
 be applied in any case where it is necessary to determine what
 is the right of an Official Assignee. No doubt, as it was argued,
 he represents the creditors and is a trustee for them ; but that
 cannot give him a greater interest in the property than the in-
 solvent had. It appears to me that in the decisions in the
 Indian Courts this rule has been lost sight of, and the question
 has been treated as if it were whether the property passed to

(1) L. R., 1 Scotch App., 382.

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the Official Assignee, and whether any charge or lien upon it was created by the attachment. I except the case of *Gamble v Bhoglagir* (1), where the point was not raised, and it was assumed that if the attachment after decree was complete without re-seizure by the nazir, the execution creditor was entitled to preference, as regarded the attached goods over the Official Assignee. I think the question before us must be decided by considering the rule laid down by Lord St. Leonards and Lord Westbury in connection with the provisions of the Code of Civil Procedure. At the most, the English cases upon a different form of Procedure in execution can only assist us as being analogous. It is a little remarkable that although the English law has been so much referred to in considering this question, the case in the English Court which is most applicable to it appears to have been the least noticed. It is not mentioned in the elaborate judgment of the High Court of the North West Provinces,—*Sarkies v. Mussamut Bundho Bae*s (2). I mean the case of *Woodland v. Fuller* (3). There a writ of *fi. fa.* against a person was lodged with the deputy of the sheriff who immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made by the Insolvent Debtors Court transferring the person's estate, and the assignee took possession of his property under it. The Sheriff's officer afterwards seized it, and it was held by the Court of Queen's Bench, that the seizure was proper; that the vesting order only vested the property in the assignee subject to the right of the execution creditor. The Court entertained no doubt, and the case is an instance of the application of the rule, that the assignee takes the property subject to the rights and equities which affected it at the time of the bankruptcy or insolvency. But as I have said, the question must be answered by a reference to the Code of Civil Procedure.

By Section 15 of Act XXIII of 1861, substituted for Section 215 of Act VIII of 1859, it is enacted that, "if the application for execution of a decree be admitted, the Court shall order execution of the decree according to the nature of the appli-

(1) 2 Bom. H. C. Rep., 150.

(3) 11 A. & E., 859.

(2) 1 Allahabad H. C. Rep., Pt. VI, 81.

"cation." Section 221 of Act VIII of 1859, says: "When all necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree." 1870
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Section 232 is "If the decree be for money and the amount thereof is to be levied from the property of the person against whom the same may have been pronounced, the Court, shall cause the property to be attached in the manner following," and thereafter the different modes of attachment are given. Section 242 says: "In all cases of attachment under the preceding sections, it shall be competent to the Court at any time during the attachment to direct that any part of the property so attached as shall consist of money or bank notes or a sufficient part thereof shall be paid over to the party applying for execution of the decree, or that any part of the property so attached as may not consist of money or bank notes so far as may be necessary for the satisfaction of the decree, shall be sold, and that the money which may be realized by such sale or a sufficient part thereof shall be paid to such party."

Now, it is a rule, that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. This has been often decided, and it is sufficient to quote the cases of *Macdougall v. Paterson* (1), *Crake v. Powel* (2), and *Bowes v. Hope Life Insurance Company* (3). In those cases the word used in the Statute was 'may.' According to this rule, the words "it shall be competent to the Court" in Section 242 must not be construed as giving to the Court a power which it may exercise or not as it thinks fit, but as obligatory and conferring on the attaching creditor a right to have the attached property sold and the money realized by the sale paid to him.

Section 116, which provides for the non-appearance of one or more of several plaintiffs, is an instance of the same words "it

(1) 11 C. B., 755.

(3) 11 H. L. C., 389.

(2) 2 E. & B., 210.

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shall be competent to the Court" being obligatory, and so is section 97, where, if the plaintiff satisfies "the Court that there "are sufficient grounds for permitting him to withdraw from the "suit with liberty to bring a fresh suit for the same matter," the Court is bound to grant the permission.

In several sections the word "may" is clearly obligatory, for instance—84, 90, 101, 143, and the first part of 102. In the latter part of this Section the words "if it think proper" are introduced after "may" apparently to show that it is not obligatory. Section 351 is another instance of this, the words there being "if it think right."

In Section 92, as to injunctions, the words "it shall be lawful for the Court" are clearly obligatory when a proper case arises. It would be contrary to the whole scope of the Act to hold that by an attachment after decree the creditor does not acquire a right to have the property sold, and that the Court may arbitrarily refuse to issue the order for sale.

Section 240 appears to me to furnish a strong argument against the Official Assignee. By that section the right or equity created by the attachment is such that it cannot be affected by even a *bonâ fide* alienation for value without notice of it. The vesting order ranks no higher than a gratuitous alienation, and it cannot be consistently held that it is to defeat the attachment when an alienation for value is not allowed to do so. It was argued that after the vesting order, the property cannot be sold as that of the judgment-debtor, as it has passed to the Official Assignee, but the answer to that is that it has so passed subject to being divested by a sale in execution of the decree, and it may still be sold as the property of the judgment-debtor. In this case, I think, the sale on the 17th of April by order of the Zillah Judge was legal notwithstanding the vesting order, and the defendant Anand Chandra Pal acquired a good title to the property under it, and that the plaintiff has no right to recover it from him.

BAYLEY, KEMP, and JACKSON, JJ., concurred.

PHEAR, J.—During the argument in this case, both sides seemingly considered that decisions given by me in two former

cases—*Petumber Mundle v. Cochran* (1), *Roy Chunder Roy v. Bampton* (2) afford material support to the position which the present plaintiff endeavours to maintain.

Judging from the mode in which those decisions have been used both here and elsewhere, I cannot help thinking that their effect has been in some degree misunderstood; and that an explanation of them will not be out of place now. In each of the cases it happened that the "contest turned solely on the immediate proprietary rights of the parties, whatever those were, in the subject attached at a time when a vesting order had been made by the Insolvent Court after attachment (under different circumstances in the two cases) and when a sale had not taken place nor even an order for sale passed.

The material fact of the first case were as follows. A suit was pending before the High Court in which before decree certain property had, at the instance of the plaintiff, been attached as being the property of the defendant. After the date of this attachment, and also before decree, an order of the Insolvent Court was made by which all the property of the defendant vested in the Official Assignee. The Official Assignee thereupon claimed the attached property under the provisions of Section 86 of the Civil Procedure Code, and succeeded in getting the attachment removed and the property handed over to him. The plaintiff then proceeded to trial, and having obtained a decree without taking any proceedings in execution either by re-attaching the property or otherwise, brought a regular suit against the Official Assignee for the purpose of asserting a right of some sort to the property solely upon the foundation of the original attachment. The Court in giving judgment remarked upon the peculiarly indefinite character of the right put forward by the plaintiff, and it dismissed the plaintiff's suit on the ground that an attachment effected before decree did not alone create in favor of the plaintiff any such definite lien or charge on the property in the hands of the Official Assignee as could be relied in a separate suit.

In the second case, namely, in *Roy Chunder Roy v. Bampton* (2).

(1) 1, Ind. Jur., N. S., 11.

(2) 2 Ind. Jur., N. S., 188.

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money due to the judgment-debtor in the hands of the Administrator-General was attached by the High Court in execution of a decree passed by itself, and afterwards before any further steps were taken to obtain execution the judgment-debtor filed his petition in the Insolvent Court, and the usual vesting order was made thereon. In this state of things the judgment-creditor applied to the High Court for execution of his decree by the payment over to him of the monies attached, insisting that the attachment had given him a right to them in the shape of a lien or charge upon them for the amount of his decree. The only contested question before the Court was, as the Court itself stated it, whether the assets, at the time when by virtue of the vesting order they passed into the hands of the Official Assignee, carried with them an existing liability to be sold in execution of the decree for which they were attached, in priority to the rights of the Official Assignee as representing the general body of creditors. The Court answered this question in the negative and after holding that the execution proceedings had not gone far enough to yield the judgment-creditor any such right as would bind the property in the hands of a *bonâ fide* alienee, it expressed the opinion on the particular facts of the case that there was no hardship in the judgment-creditor being placed on the same footing as all the other creditors. Accordingly it refused the judgment-creditor's application for an order for sale, or rather its equivalent, an order for transfer of the money, as it well might in exercise of the discretion reposed in it by section 49 of the Insolvent Act.

The footing upon which the decision of the Court in each of these cases rested, may be thus stated, namely, that the attachment, whether effected in the course of the suit before decree as in the first case, or in the execution proceedings after the decree as in the second case, did not of itself alone create in favor of the attacher any lien or other proprietary interest in the property attached, and, after the able discussion of all the authorities bearing upon the point which has taken place before us, I see no reason now for altering this statement of the law or for thinking that those cases were in any degree wrongly decided.

It appears to me, however, that the rights of the parties to the present suit lie entirely outside the scope of those decisions. The defendant founds his claim to be the owner of the land and house, for which the plaintiff sues, upon the title of a sale made to him by the Civil Court in the execution proceedings of a certain suit between other parties. The land and house, when attached in the course of those proceedings were the property of the judgment-debtor, but before the sale took place a vesting order of the Insolvent Court transferred the property to the Official Assignee. Under these circumstances we are not called upon to consider whether or not the *factum* of an attachment gives the judgment-creditor a right of lien which the Court executing the decree is bound to enforce without regard to the occurrence of insolvency : but the material question before us is substantially this, namely, did the Civil Court, at the time of making the sale on the facts of the case referred to us, possess the power of selling which it affected to exercise, notwithstanding the previous alienation of the property to the Official Assignee. I think a little consideration will show that the answer to this question does not hinge upon the nature of the action, if any, which attachment may have upon the proprietary rights of any one on the subject which is attached.

I will endeavor shortly to explain the mode in which the matter presents itself to my mind. When in any ordinary money suit, the property of the defendant is attached before decree, it seems clear to me that that property does not thereby become any element in the *lis pendens*. But when a decree or order has been passed in the suit, and the judgment-creditor, by way of proceeding to obtain execution thereof, asks the Court to attach specified property of the judgment debtor, the case is wholly changed in this respect : the judgment-creditor by that step sets up a right to have his claim satisfied out of that particular property, and, if the attachment so sought be made, thenceforward the attached property, so far as the purposes of the execution are concerned, constitutes the substantial subject of suit between the parties. Now, if we suppose for the moment that the property, instead of having thus become the subject of litigation between the parties in the execution stage of a suit for money, had been the original subject of the suit, and if, during the

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pendency of such suit, before decree, the owner had aliened it, then no doubt, upon principles of public expediency which are acknowledged in all our Courts, the alienee would be held to take with express notice of the suit and would be bound by the decree therein, though not himself a party thereto; but I understand the operation of this doctrine to be limited to the actual subject of the suit itself; it does not extend to collateral proceedings, and, even as regards the subject of suit, loses its force when the alienation is involuntary. Thus, for instance, in the English Court of Chancery in the event of a defendant in a suit becoming bankrupt, the plaintiff can only effectively proceed with the suit by making the assignee a party. Going back then from this point to that subsidiary suit against the property of the judgment-debtor, which for convenience' sake I take the proceedings in execution of a money decree to constitute, I think the general principle, namely, the principle that ordinarily a decree of the Court only binds the parties to the suit is here unaffected by the doctrine which I have mentioned, and therefore would, apart from legislative enactment, prevent what I may term the execution suit from being infructuous in regard to so much of its subject as might be aliened during its pendency until at least the alienee should be brought within its scope by being made a party. In England where the execution proceeding is nothing more than the act of suing out the writ and placing it in the hand of the Sheriff, there is little risk of its being defeated by an alienation during its pendency. But in this country the case is different. Under the Code which governs procedure here the proceedings necessary to obtain execution of a decree of Court commonly rival, in length and complexity, the proceedings of the suit before decree, and not seldom greatly exceed them in these respects. The legislature has accordingly thought fit to provide against fraud of vexatious conduct on the part of the judgment-debtor towards his judgment-creditor pending the execution proceedings, by the enactment of Section 240 of Act VIII of 1859. At one time there was some difference of opinion relative to the exact operation of this section, but it is now settled by a decision of the Full Bench (1), as I understand it, that the effect of the

(1) 2 B. L. R., F. B., 49.

section is precisely the same with regard to alienations effected pending the execution proceedings as that of the rule of law which I first referred to relative to alienations of the subject of suit made during the suit itself. The section does neither more nor less than bind the alienee in the cases to which it applies by the order of sale which may be made by the Court after alienation notwithstanding that he, the alienee, be not a party to the proceedings.

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. In my view, then a judgment-creditor, when he attaches specific property of his judgment-debtor in execution of a money decree, may, with convenience, be regarded as having instituted a suit or rather as having converted the original suit against his judgment-debtor into a suit in respect of that property, and this suit, if successful, will terminate in a decision *in rem* in the shape of an order for sale: if during this suit before the order for sale an alienation be effected which does not fall within the operation of section 240, the judgment-creditor can only pursue his claim against the property in the hands of the alienee by making the alienee a party to the suit. On the other hand, if the alienation be such that it is covered by section 240, it may be entirely disregarded. To use the words of the Master of the Rolls in the *Bishop of Winchester v. Paine* (1) (and I quote these words because I think they precisely represent the effect of the Full Bench decision to which I have referred): "The litigating parties are exempted from the necessity of taking notice of a title so acquired. As to them, it is as if no such title existed."

I come now to the enquiry, is the alienation which is effected by the force of the vesting order of the Insolvent Court within the words of section 240? Is it such a private alienation as is there spoken of? I think not. Clearly, the Legislature, by the use of the word "private," intended something in the way of a limiting or qualifying character. "Private alienation" must mean something short of all alienations whatever. In the repealed Regulation, from which section 240 is taken, private alienation is opposed to alienation by auction sale, and I apprehend that at the date of that Regulation the words "auction sale" referred to a sale effected

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under some power of selling paramount to the owner's will. In my opinion, private alienation means alienation voluntarily effected by the owner in exercise of his ordinary powers of ownership. This, the alienation which is brought about by the vesting order, is not. It may no doubt be said to proceed from the will of the owner, when it is the consequence of a petition of insolvency presented by him. But in the same way a sale made by the Collector for default of payment of Government revenue in cases where the default is wilful (and such cases certainly occur) would be voluntary on the part of the defaulter; and if the intention of the owner that the alienation should take place is enough to render the alienation private within the meaning of section 240, such a sale would be voided by that section as against a previous attaching creditor; but I think no one would be bold enough to argue that it is so. It seems to me that the alienation caused by the vesting order is an alienation affected by operation of law for the benefit of all the owner's creditors upon the happening of certain events, and that its character is in no wise altered by the circumstance that in one alternative the principal event is a voluntary act of the insolvent himself. It follows, according to the views which I have endeavoured to express, that when a vesting order is made relative to the property of a judgment-debtor after attachment in execution of a decree and before order for sale, the judgment-creditor, in order to pursue his claim against the attached property, must make the Official Assignee party to the proceedings. If he does so, he has, I think, with a qualification which I will presently mention, the same right as against the Official Assignee to have the attached property sold as he had before the vesting order against his judgment-debtor. I have never doubted that, apart from the equitable considerations introduced by the Insolvent Act, the Official Assignee, by virtue of the vesting order, takes the property of the judgment-debtor simply as the judgment-debtor himself held it. Indeed I expressly stated in the case of *Petumber Mundle v. Cochran* (1) that he takes it subject to the same equities as those to which it was subject in the hands of the insolvent. And it is therefore much satisfaction to me to find that

(1) 1 Ind. Jur., N S., 11.

this doctrine has recently, since the case of *Petumber Mundle v. Cochrane* (1), been forcibly enunciated by so eminent an authority as Lord Westbury in *Fleming v. Howden* (2). The vesting order simply transfers the property from the one person to the other, and therefore does not deprive the attaching Court of jurisdiction in due course of proceeding and in proper exercise of its judicial discretion to order the sale of the attached property. But when the Court is asked to order the sale of the property after it has been thus transferred to the Official Assignee, and when it has the Official Assignee properly before it, then comes into play the qualification which I conceive to be effected by the insolvency in the right of the judgment-creditor to pursue the property,—namely, that this right of his against his debtor, however it may be designated, ought not to be allowed to defeat the policy of the Insolvent Act. It is not necessary for me now to discuss this particular topic further. I will only add that when sitting on the other side of this Court in the exercise of its original civil jurisdiction, I have invariably considered myself bound, on the application of the Official Assignee, to stay or set aside execution proceedings and to allow him to take the judgment-debtor's attached assets, unless special reason for a contrary course has been shown. I have always understood the policy of the Insolvent Act to be that all the creditors alike, irrespective of their individual priorities or diligence, should be paid rateably, the Act in this respect differing notably from the Winding-up-acts; and it has appeared to me that the discretion vested in the Civil Courts by section 49 of the Insolvent Act was bestowed upon those Courts in order that it should be exercised in furtherance of the purposes of the Act. Of course the equities of the Insolvent Act rest upon the assumption that there is real insolvency, and that there are assets to administer. If, therefore, in any given case the Civil Court has reason to believe that the insolvency proceedings are fictitious and instituted by the judgment-debtor himself for the purpose of harassing or defrauding his creditor, that Court would be right in refusing to stay execution at the instance of the Official Assignee.

() 1 Ind. Jur., N. S., 11.

(2) L. R., 1 Scotch App., 382.

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On the case which is stated to us in this reference, I must assume that the proceedings of the Zilla Judge were regular. I do not think that the vesting order made by the Insolvent Court affected his jurisdiction to continue the execution proceedings and to order the sale of the attached property, if in the due exercise of his judicial discretion he thought fit to do so. It is not expressly said that he had the Official Assignee before the Court after the transfer of property effected by the vesting order and before making the sale, but I cannot suppose that he omitted this step, and indeed it seemed to be admitted in the argument that the Official Assignee had been heard in the Zilla Court. It is not our concern to enquire whether or not the Judge might with propriety have stayed the execution proceedings; we must take it that he did in fact order the sale in due course, and I think, consequently, that that sale operated to pass the property out of the hands of the Official Assignee into those of the purchaser-defendant, and that the Official Assignee was thus left without anything to sell to the plaintiff.

Before Sir Richard Couch, Kt, Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Phear, and Mr. Justice Mitter.

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May 16.

BADHA PYARI DEBI CHOWDHRAIN AND OTHERS (PLAINTIFFS) v.
NABIN CHANDRA CHOWDHRY (DEFENDANT).*

Act VIII of 1859, s. 230—Evidence—Title—Possession.

See also 11 B.L.R. 239. On an application under section 230, Act VIII of 1859, in the investigation of the matter in dispute, the Court may go into the question of title. It is open to the applicant to give evidence of title beyond mere possession, and the decree-holder may prove his title to the property.

ONE Nabin Chandra Chowdhry obtained a decree against the Government for possession of certain fisheries, and in execution of his decree he obtained possession of them. The plaintiffs in the several cases applied to the Court, under section 230 of Act VIII of 1859, stating that they had severally been in possession of the said fisheries; that the fisheries belonged to them; that

* Regular Appeals, Nos. 182, 184, 189 and 213 of 1868, from a decree of the Judge of Rungpore, dated the 10th December 1868.

they were not parties to the suit in which the decree was passed, and praying to be restored to possession.

The Judge found that there were conflicting claims regarding the fisheries in dispute, and dismissed all the suits, leaving the several plaintiffs to their remedy by suit.

On appeal, the High Court (NORMAN and E. JACKSON, JJ.) remanded the several cases for trial of the following issues in each :

Was the claimant really and *bond fide* in possession of the fisheries claimed, at the time of the execution of the decree ?

Was he dispossessed by the decree-holder in execution of the decree ?

On remand, the Judge passed decrees in favor of the plaintiffs in cases Nos. 182, 184, and 213, and dismissed the case No. 198.

Objections were filed to the several findings of the Judge.

The appeal in case No. 198 came on for hearing before a Division Bench (NORMAN and E. JACKSON, JJ.) On account of the conflicting decisions in *Nujender Ohunder Ghose v. Ram Comul Mundul* (1), *Mahomed Ausur, v. Prokash Chunder Sha* (2), *Ajoo Khan v. Kisto Pershad Lahoory* (3), their Lordships referred the following questions for the decision of a Full Bench, viz. :

" Whether a person, who has been dispossessed of land or fisheries in execution of a decree against a third person to which he is no party, is bound to prove anything more than that he was really and *bond fide* in possession, and dispossessed in execution of such decree ?

" Whether the decree-holder can put the plaintiff to proof of his title, or, on an application numbered and registered as a suit under section 230, in answer to and not merely as controverting the plaintiff's evidence of possession, can go into evidence of title himself ?"

Baboo *Srinath Das* for the appellants.

Babooos *Aushutash Chatterjee* and *Mahini Mohan Roy* for the respondents.

(1) 3 W. R., 213.

(3) 8 W. R., 477.

(2) 8 W. R., 8.

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The following were the opinions of the Full Bench :—

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COUCH, C. J.—We must endeavour to collect the intention of the Legislature in section 230 from the language which they have used. It appears to me that, looking to that language, the title may be gone into in an application under that section. The section provides for the case where a party in a suit for the recovery of immoveable property has obtained a decree, and the decree is about to be executed. It says that, “if any person, other than the defendant, shall be dispossessed of any land or other immoveable property in execution of a decree, and such person shall dispute the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bonâ fide* in his possession on his own account or on account of some other person than the defendant, and that it was not included in the decree, or, if included in the decree, that he was not a party to the suit in which the decree was passed, he may apply to the Court within one month from the date of such dispossession; and if, after examining the applicant, it shall appear to the Court that there is probable cause for making the application, the application shall be numbered and registered as a suit between the applicant as plaintiff and the decree-holder as defendant.” Then it says what is to be done,—namely, that “the Court shall proceed to investigate the matter in dispute.” Now what is the matter in dispute? I think that the matter in dispute is the right of the decree-holder to dispossess the applicant of the property under the decree, and the subsequent words which state the grounds upon which the applicant may come to the Court do not restrict the meaning of those words, but are intended to show the cases in which the applicant is entitled to come to the Court. Unless he can show that he was *bonâ fide* in possession on his own account or on account of some other person, he has no right to apply to the Court, but if he can show that, and if the Court is satisfied that there was probable cause for his application, the Court may receive it and proceed to investigate the matter; but still the matter in dispute appears to me to be the right of the decree-holder to dispossess him. So far, then, I think that there is nothing in this section to show that the matter to be tried was limited merely to the question of possession; but then

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we come to the words that the Court "is to investigate the matter in the same manner and with the like powers as if a suit for the property had been instituted by the applicant against the decree-holder." Now, if a suit for the property had been instituted by the applicant against the decree-holder, instead of having been instituted by the decree-holder against some other person, the title would have been gone into. A suit instituted to recover the property, and not to recover merely the possession, is a suit in which there would have been an enquiry into the title. Looking then at these words, it appears to me that we may collect that it was the intention of the Legislature, in a case of this kind, that if the Court should be satisfied that there was a probable ground for the application, the title should be tried between the parties; and the mode of proceeding provided is that the applicant may come in and show that he was really entitled to the property, and that the decree obtained by the decree-holder for the recovery of it was obtained against the wrong person, and was not binding in any way upon the applicant. This construction appears to me to be somewhat strengthened by the words of section 231, which says that no future suits "shall be entertained in any Court between the same party or parties claiming under them in respect of the same cause of action." The cause of action in a suit for the recovery of property under section 230 would be the dispossession under the decree. It may certainly be that the applicant might show that there was a dispossession of the property at some other time, and possibly in that way he might escape from being bound by section 231; but it appears to me that the Legislature using the words "in respect of the same cause of action" really contemplated the case of the applicant asserting his title to the property, saying that he has been dispossessed of it, and that it was his, and bringing a suit for the recovery of it; and that they intended to treat the proceedings under section 230, as if the applicant had brought a suit. I cannot say that the language of the section is as clear as it might be, but it appears to me that it may fairly be collected from the language used that that was the intention of the Legislature. Then we must apply that construction to the questions which have been put to us, and which perhaps require to be

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answered in some special manner. The first question is "whether a person who has been dispossessed of land or fisheries in execution of a decree against a third person, not a party to the case, is bound to prove anything more than that he was really and *bonâ fide* in possession, and dispossessed in execution of the decree." Now it does not follow from the Court having the power to go into the question of title, that the applicant, or the plaintiff in such a case, is bound to prove more than that he was really and *bonâ fide* in possession. If he proved that, it would be evidence of title upon which he might rest his case, and if he did not choose to go into evidence of his title, we cannot say that he was bound to do it. Now, with regard to the first branch of the second question, whether the decree-holder can put the plaintiff to proof of his title, although we say that the decree-holder can do so, he cannot insist upon direct proof of title, and the plaintiff may, if he thinks fit, rely upon his possession; but, as to the latter branch of the question, whether the decree-holder can go into evidence of title in himself, we must say that he can; if he has a good title he is at liberty to give evidence of that title and to prove that he is really the person to whom the property belongs, and that it should not be taken in execution of the decree. This is the way in which it appears to me these questions must be answered.

KEMP, J.—I am of the same opinion.

JACKSON, J.—I am of the same opinion. I think that sections 230 and 231 of the Code of Civil Procedure must be read together, and that the terms of the last mentioned section will very materially assist us in coming to a conclusion as to what the Legislature meant by the first mentioned section.

The earlier words of section 230 refer to the circumstances which will entitle a party to make application to the Court under this section,—that is to say, that the property which has been the subject of dispossession "was *bonâ fide* in his possession on his own account, or on account of some other person "than the defendant, and that it was not included in the decree, "or if included in the decree, that he was not a party to the suit

" in which the decree was passed ;" and then follow the words " if, after examining the applicant, it shall appear to the Court " that there is probable cause for making the application," that is to say, that the Court is to satisfy itself of the existence of those circumstances, namely, that the applicant was *bonâ fide* in possession as stated above, and that the land was not included in the decree, or, if included, that he was not a party to the suit in which the decree was passed ; and the Court, on becoming satisfied that there was such probable cause as that for making the application, is then empowered to deal with the matter, and treat it as if it were " a suit between the applicant as plaintiff, " and the decree-holder as defendant," and proceed to investigate the matter in dispute " in the same manner as if a suit for the property had been instituted by the applicant against the decree-holder."

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I concur with the learned Chief Justice in thinking that the matter in dispute is the enlarged subject-matter which the Court arrives at, after satisfying itself of the existence of the cause for making the application ; and that the power conferred upon the Court in investigating the matter and passing a decision is the same as in an ordinary civil suit. That decision, under section 231, is " of the same force as a decree," that is, a decree for the property " subject to appeal ;" that would be an appeal to determine whether the decision as to the right to the property was correct : and then the section concludes with saying " that no fresh suit shall be entertained in any Court between " the same party or parties claiming under them in respect " of the same cause of action."

The course of procedure, it will be seen, is in marked contrast with that laid down in section 246, on a somewhat cognate subject. There it is said that an " order passed by the Court under " this section shall not be subject to appeal, but the party against " whom the order may be given, shall be at liberty to bring a suit to establish his right." Then when the Legislature, by this section, debars the party or parties claiming under him from bringing a fresh suit in respect of the same cause of action, which, I apprehend, would be a suit based upon the dispossession under that decree, and in which the plaintiff would seek to establish

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his title, they would not have excluded him from bringing a fresh suit unless they had at the same time given him the means and opportunity of adducing every thing he could to entitle him to succeed, and consequently unless he had been competent to prove his title in those proceedings.

As to the particular mode in which the question should be answered, I entirely concur with the Chief Justice.

PHEAR, J.—I do not dissent.

MITTER, J.—I concur in this judgment.

APPENDIX.

APPENDIX.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

DINANATH MOOKERJEE (PLAINTIFF) v. DEBNATH MALLICK AND ANOTHER
(DEFENDANTS).*

1870
March, 30.

*Instalment Bond—"Nuzzur"—"Salami"—Abwab—Unregistered Potta and Kabuliat
—Set-off—Evidence.*

Plaintiff sued in a Small Cause Court, on an instalment bond, for 81 rupees. The bond had been executed for *Nuzzur* or *Salami* contemporaneously with the execution of a potta and kabuliat, by which the defendants agreed to pay the plaintiff 335 rupees a year, for two years, as rent for certain land. The potta and kabuliat had not been registered. A previous suit brought by the plaintiff under Act X of 1859, had been therefore, dismissed, and no oral evidence was admitted to prove the terms of the potta and kabuliat. The defendants now claimed a set-off against the amount claimed under the bond, on the footing of a contract contained in the potta and kabuliat. The Judge refused to receive them in evidence, or to receive oral evidence of their contents, and gave a decree in favour of the plaintiff, subject to the opinion of the High Court on four questions submitted by him.

Held, the suit on the bond was properly cognizable by the Small Cause Court as a simple debt due under the bond. It was clearly not for an *abwab* or illegal cess; whether it was *Nuzzur* or *Salami* was immaterial. The defendant having benefited in the Act X suit by the fact that no oral evidence had been admitted to prove the contents of the potta and kabuliat, it would have been contrary to rule and inequitable to admit such evidence now in support of his claim of set-off.

THE following case was referred for the opinion of the High Court :

"Plaintiff sues defendants, on an instalment bond, for rupees 81. Defendants, admitting execution of the bond, have raised a variety of pleas, and have presented a petition praying for a reference to the High Court on several points. The bond was executed contemporaneously with a lease of certain land by plaintiff to defendants, whereby the latter undertook to pay him a yearly rent of rupees 335, for two years. The bond contains a statement that the consideration consisted of a sum of money then and there lent by plaintiff to defendants in cash, which they undertook to repay by instalments; but in the plaint it is admitted that no cash passed at the time, and that the bond was executed in lieu of *Nuzzur* on account of the lease. Plaintiff was personally examined on this point, and says it was for *Salami*. Defendants have produced several witnesses, who have stated that it was in lieu of additional rent over and above that stated in the lease. I do not think the conflict of evidence on this point, however, matters much. There is no doubt that the bond had reference to the engagement of defendants, to rent the land of plaintiff, and

* Reference, No. 5, dated the 4th February 1870, from the Judge of the Small Cause Court at Kishnaghur.

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whether it was *Nuzzur* or *Salami*, or by way of additional rent, defendants executed it with their eyes open, and under no compulsion; and further they have derived the full benefit of the consideration even on their own showing, 'nasmuch as they obtained possession of the land and held it for the specified period of two years.

"The first point which I have to refer for the High Court's decision is, Whether the suit on the instalment bond is cognizable in this Court, or the Revenue Court? *Bhubo Soonduree Debia v. Nawab Syud Jynal Abdin* (1) and *Raja Sutto Churn Ghosal v. Mahomed Ally* (2).

"The second question which I have to propose for the High Court's decision is, Whether there is a variance sufficient to justify the dismissal of the suit, between the allegations in the plaint and those in the evidence?

"The third question submitted is, Whether the sum stated in the bond is to be considered as *abwab* or illegal cess, and so not recoverable. *Bhubo Soonduree Debia v. Nawab Syud Jynal Abdin* (1).

"There is a fourth, however, which I consider of sufficient importance to refer, of my own motion. Assuming that there is nothing illegal in plaintiff's claim, and that it will lie in this Court, defendants have raised a plea of payment in various ways, or more properly as set-off, though they have not filed a written statement of set-off according to section 121 of the Civil Procedure Code. These payments, for which defendants claim credit, consist partly of money payments with which they have been credited by plaintiff in the rent, partly of the expenses incurred by them on plaintiff's account in certain "*Nijabad*" cultivation, partly of collection charges, and miscellaneous expenses in litigation and the like. If defendants are credited with all they claim on these heads, both the rent under the lease and the amount of the bond in this suit, will have been liquidated; but their authority for deducting these sums from the rent consists in the potta and the kabuliat interchanged between them and plaintiff, the former of which has not been produced, but which is admitted not to have been registered, and the latter is inadmissible in evidence under section 49, Act XX of 1866. Clause 4, section 17 of Act XX of 1866 read in connection with the definition of lease given in section 2 of the same Act, making the registration of such a document compulsory; in fact in a suit for arrears of rent which plaintiff had already instituted against defendant in the Revenue Court, the suit was thrown out on the ground of the inadmissibility of this kabuliat for want of registration.

"The question then with regard to these alleged set-offs or repayments which I have to submit is, Whether oral evidence is admissible to prove defendants authority to set-off these sums against the amount of the rent and bond, when the instrument itself which contains that authorization is inadmissible as evidence?

"In the Act X case, defendants' suit was dismissed, because the kabuliat was not registered, and oral evidence was not allowed in lieu of it. Defendants

profited in that case by an interpretation of the law which would be fatal to their plea in the present one. See *Sheikh Rahmatulla v. Sheikh Sariutullah Kagchi* (1).

"I have given plaintiff a decree contingent on the opinion of the High Court."

Baboo Durga Das Dutt for plaintiff.

Baboo Rash Behari Ghose for defendant,

The opinion of the Court was delivered by

JACKSON, J.—The Judge in this case refers four points for the opinion of this Court, three of which are so referred at the request of the defendants, and the fourth by the Judge, of his own motion. Of the three first points, the pleader who appears before us here for the defendants, has only thought fit to argue one, that is, whether the suit was within the competency of the Small Cause Court.

It appears to me quite clear that the suit was one cognizable by the Court of Small Causes. The amount claimed was due under a bond executed by the defendants, in which the money was described as money lent; but the plaintiff alleged that it was payable as *Nuzzur*, and the plaintiff in his examination stated that it was payable by way of *Salami*. Both these terms are used to denote money paid by a lessee in consideration of a lease granted, and it appears that the defendants in this case had taken a lease from the plaintiff, and a potta and kabuliati were interchanged between them. The defendants contended, under these circumstances, that the money conditioned for was rent. I think it cannot be looked upon as rent, but it was simply a debt due by the defendants upon a contract (not of the excepted kinds) and therefore recoverable in the Small Cause Court.

The second question submitted by the Judge, and which has not been argued here, is one which, if we were to answer, we should, in fact, be deciding the suit upon the merits between the parties.

The third question is also one which the defendants' pleader has abstained, and, I think, wisely, from arguing here. The amount claimed, clearly, could not be looked upon as *abwab*.

On the fourth point, it appears to me that the opinion of the Judge is correct. The defendants alleged a set-off against the claim of the plaintiff, and the right to make such set-off was derived by the defendants, or alleged to have been derived, under a special contract between the parties. The contract was not contained in the bond, but it had been reduced to writing, and is to be found in the potta and kabuliati. These two instruments have been found inadmissible by reason of non-registration, and it seems that the suit of the plaintiff for rent against the defendants was dismissed.

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by reason of such non-registration, and the plaintiff's consequent failure to prove the defendants' engagement. Under these circumstances, it would be not only contrary to rule, but highly inequitable, to allow the defendants to set up and prove the set-off which they claim under the same contract. I think therefore, that all the questions must be answered in favour of the plaintiff, who will be entitled to the costs of this hearing.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

NANDA KUMAR SHAHA (PLAINTIFF) v. GAUR SANKAR AND ANOTHER (DEFENDANTS).*

1870

March 30

Act VIII of 1859, ss. 92, 96—Injunction—Compensation, Suit for—Limitation Act XIV of 1859, s. 1, cl. 2.

A. having brought a suit against B., obtained and issued, on the 24th July 1868, an injunction against him under section 92, Act VIII of 1859. The suit was, on the 18th August 1868, dismissed; but no compensation was awarded to B. under section 9, of Act VIII of 1859, in respect of the injunction which had been issued against him A. and B. both appealed; the former against the decision dismissing his suit, the latter for compensation. Both appeals were dismissed on the 23rd November 1869,—B.'s, because it was engrossed on a stamp paper of the value of eight annas only.

B., on the 16th December 1869, then instituted a suit against A. in the Small Cause Court, for damages in consequence of the injunction which A. had caused to issue against him in his suit.

Held, that B. was not debarred, by section 96 of Act VIII of 1859, from instituting a suit against A. for damages, there not having been an award of compensation under that section. The cause of action accrued from the time at which the plaintiff was first damaged by the wrongful injunction; continued as long as the injunction remained in force; and limitation began to run as soon as the injunction was at an end.

This was a reference from the Judge of the Small Cause Court, Backergunge, dated, the 2nd January 1870.

"The defendant's predecessor, Jibaa Sing Burmon, deceased, had, on the 24th July 1868, issued an injunction, under section 92 of Act VIII of 1859, against the plaintiff, after instituting a suit in the Moonsiff's Court, which was dismissed, on the 18th August 1868, without compensation, under section 96 of the same Act, being allowed to him (plaintiff). Both the defendant and plaintiff had preferred appeals against the decision of the Moonsiff, the first for being dissatisfied with his decision regarding his suit, and the second for compensation being denied to him. Both appeals were dismissed on the 23rd November 1869, and the plaintiff's petition of cross appeal for compensation was rejected for its being engrossed on a stamp of the value of eight annas only. On failure in obtaining compensation from the Appellate Court, the plaintiff instituted the present suit, on the 16th December 1869, which, too, was dismissed on the 31st of the same

* Reference, No. 6 of 1870, from the Judge of the Small Cause Court of Backergunge, dated the 28th January 1870.

month, on the plea of its being barred by limitation. The plaintiff, subsequently, filed a petition for obtaining a review.

1870

NANDA KUMAR
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"The pleaders on both sides have agreed that the suit for compensation in the case is to be preferred within one year, as provided by clause 2 of section 1 of Act XIV of 1859, but have differed as to the date when the cause of action should be considered to have accrued. The pleader for the plaintiff has urged that it must be thought to have accrued from 23rd November 1869, when the appeal for obtaining compensation was dismissed, for the hope of getting it could not be at an end until that date. But the pleader for the opposite party takes a different view of the matter, and urges that the suit for compensation should have been preferred on or after the 18th August 1868, when the Moonsiff having denied him compensation, he (plaintiff) should have tried to obtain it through the assistance of a competent Court.

"I entertain doubt on two points in the case, on which I respectfully solicit the opinion of the Court:—1st, whether a fresh suit for compensation on account of damages incurred in consequence of taking out an illegal injunction under section 92 of Act VIII of 1859, can be entertained, when the question had been once brought forward for decision, before an appellate Court, but rejected on a distinct ground; and 2nd, if the suit can be admitted on the ground of its not being decided on its merits by the Appellate Court, is the cause of action to be considered as having accrued from 18th August 1868, the date of decision by the Moonsiff, or from 23rd November 1869, when the cross appeal by the plaintiff was dismissed."

The opinion of the Court was delivered by

JACKSON, J.—In this case the plaintiff was defendant in a civil suit in the Court of the Moonsiff. The plaintiff in that suit claimed an injunction under section 92 of the Code of Civil Procedure, but that suit was eventually dismissed without, however, any award of compensation being made to the defendant.

The plaintiff who had his suit dismissed, appealed against the order of dismissal, and the defendant made an objection, apparently under section 348, on the ground of compensation having been denied him. The appeal of the plaintiff was dismissed; and the Judge declined to go into the objection of the defendant, on the ground that he had only paid a stamp duty of eight annas on his petition.

The defendant in those proceedings has now sued the former plaintiff for compensation.

The questions put to us by the Judge of the Small Cause Court, are, firstly, whether the suit is untenable, in consequence of the previous proceedings; and, secondly, if it be not untenable, and be cognizable by the Small Cause Court, from what period has the cause of action arisen?

I think the denial of compensation under section 90, Act VIII of 1859 will not debar the Small Cause Court from entertaining the suit. Section 96

1870 enables the Court, if it shall appear to it "that the injunction was applied for
 NANDAKUMAR "on insufficient ground, or if the claim of the plaintiff is dismissed, or judg-
 SHAHA "ment is given against him by default or otherwise, and it shall appear that
 v. "there was no probable ground for instituting the suit, to award, on the appli-
 GAUR SANKAR. "cation of the defendant, such sum not exceeding 1,000 rupees, as it may deem
 "a reasonable compensation to the defendant, for the expense or injury occa-
 "sioned to him by the issue of the injunction;" and the section concludes
 in these words,—“an award of compensation under this section shall bar any
 suit for damages in respect of the issue of the injunction.” It does not
 appear on this reference on what ground the Moonsiff in the first suit refused
 compensation. It does not appear even that compensation was applied for by
 the defendant, although he did appeal against the order refusing it. I think
 that as that section provides expressly that only an award of compensation
 shall debar any suit for damages, it follows that an unsuccessful application by
 the defendant will not debar him from instituting a suit for the purpose of
 obtaining such compensation. Whether that suit will lie in the Court of Small
 Causes is not the question before us.

Upon the second question referred to us, I should have been inclined to
 think, if the parties had not agreed to the contrary, that clause 2, section 1 of
 the Limitation Act will not govern the case; but as that question is not referred
 to us, it is unnecessary to decide it. But as to the time at which the cause of
 action accrued, it appears to me that both the plaintiff and the defendant are
 mistaken in their contention. It seems to me that the time of the accrual of
 the cause of action in this case was the time at which the plaintiff was damaged
 by the wrongful injunction obtained by the defendant, and that the cause of
 action continued as long as the injunction remained in force. As soon as the
 injunction was at an end, limitation would begin to run. It seems to me, there-
 fore, that neither the decision of the Moonsiff nor that of the Appellate Court
 was the commencement of the plaintiff's cause of action. I think the papers
 should be returned to the Court of Small Causes with these observations.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

UMA SANKAR ROY CHOWDHRY (PLAINTIFF) v. SYUD MANSUR
 ALI KHAN BAHADUR, NAWAB NAZIM OF BENGAL (DEFENDANT).*

1870

April 6.

*Valuation of Suit—Act XXVI of 1867, Schedule B, Article 11, Note A—
 Act XVI of 1868, s. 16.*

On a dispute arising as to the proper valuation of a suit, the Court may, on the
 application of either party, issue a commission, and make an enquiry into the
 market value, or the net profits of the property in dispute. The final decision as to
 the proper valuation is vested in the Court which hears the suit.

When the defendant asserts that a suit is over-valued, the *onus* of proving the
 truth of his assertion lies on him.

* Special Appeal, No. 2700 of 1869, from a decree of the Officiating Judge of
 Moorsheadabad, dated the 17th August 1869, reversing the decree of the Subordinate
 Judge of that district, dated the 31st March 1869.

Baboo Srinath Das for appellant.

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UMA SANKAR
ROY CHOW-
DERY

v.
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ALI KHAN
BAHADUR.

Baboo Anukul Chandra Mookerjee for respondent.

JACKSON, J.—The plaintiff in this case sued to recover possession of some land, part of which was occupied as a garden, and he valued his suit at rupees 2,000, estimating it at twenty times the annual net profits. The defendant objected that the suit was very much over-valued, inasmuch as the plaintiff according to his own showing, had purchased the land in dispute for rupees 671.

The Subordinate Judge was of opinion that the defendant's objection on this score was not made out, and therefore he over-ruled that objection; and going into the merits of the case, gave judgment for the plaintiff.

On appeal to the Zilla Judge, this question of valuation was again raised, and the Judge holds that ground of appeal to be a valid one. His words are these:—"The plaintiff in his plaint states that he purchased the land in dispute for rupees 671, and his first witness states that this was a proper price for the land. Consequently, this sum represents the market value of the land, and, according to section 6, Act VIII of 1859, the suit should have been instituted in the Court of the lowest grade competent to try it, which, according to Act XVI of 1868, was the Court of the Moon-siff. I think it is clear that the alternative valuation of twenty times the net profits allowed by Note A, Article 11 of Schedule B., Act XXVI of 1867, can only be allowed when there is no proof as to the market value,"

Now this is not a very accurate statement of the law by the Zilla Judge. According to the law in force, before the passing of Act XVI of 1868, the Moon-siff had jurisdiction to try a suit, of which the value did not exceed rupees 300, and the Sudder Ameen had jurisdiction in suits of which the value did not exceed rupees 1,000. The Principal Sudder Ameen had jurisdiction without limit as to value. That being the case, it was necessary to provide, for the convenience of the Courts, as was provided by section 6, Act VIII of 1859, that suits should ordinarily be tried in the Courts of the lowest grade which had jurisdiction to try them, that is, in order that the Principal Sudder Ameen's Court, although it had jurisdiction to try suits below rupees 1,000, should not be flooded with suits of that description. But the law was altered by Act XVI of 1868, and by that Act, the Subordinate Judge, unless he were invested (under section 16) with the powers of a Moon-siff, had jurisdiction to try suits below rupees 1,000 only on reference by the Zilla Judge. Consequently, if the valuation of this suit appeared to be not more than rupees 1,000, the Subordinate Judge could not have had jurisdiction to try it, unless it had been referred to him by the Zilla Judge. The stamp law in force, when this suit was commenced, directs (Schedule B, Article 11, Note A, annexed to Act XXVI of 1867) that, "in suits for immoveable property, the amount of stamp duty payable shall be computed according to the market value of the property in suit. In suits for immoveable property paying revenue to Government, where the settlement is temporary, eight times the revenue so payable, and where

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BAHADUR.

"the settlement is permanent ten times the revenue so payable, and in suits for immoveable property not paying revenue to Government, twenty times the annual net profits of such property shall be taken to be the market value thereof, unless and until the contrary shall be proved." Then, in a further note under the same article, these words follow: "In order to ascertain the market value, or the annual net profits of any such property as is described in Note A, the Court may, either of its own motion, or on the application of any party to the suit, issue a commission to any paper person directing him to make such local or other investigation as may be necessary, and to report thereon to the Court, and the decision of the Court as to the market value or annual net profits shall be final."

No doubt, the primary object of the Legislature in framing these provisions was to protect the stamp revenue of the State; but, of course, it was not to be allowed that parties, vexatiously and for the purpose of harassing their opponents, should allege an unreasonably high value of the property in dispute, and, therefore, it was made competent to the Court, on the application of either party, to issue a commission and make an enquiry into the market value, or the net profits of the property in dispute; and it was provided that the decision of the Court on that question should be final. It appears to me consequently that, if any question on the valuation of the property in dispute is raised by either of the parties, the final decision upon that point is vested in the Court which hears the suit.

But whether that be so or not, it appears to me that the Judge had no sufficient grounds for the decision which he came to, reversing the judgment of the Subordinate Judge on this point. The plaintiff, no doubt, recited that the subject of dispute had been purchased by the plaintiff for rupees 671, and the witness, no doubt, stated that the plaintiff had purchased the property at a fair price; but that must refer to the price at which the plaintiff purchased in the year 1274 (1867), or one year before the commencement of the suit. It by no means follows that the price of the property might not have risen in the interval so as to bring it up to, or nearly up to the value put upon it by the plaintiff. If the defendant desired to question the value of the property at the time of bringing the suit, it was his business, either to adduce evidence as to what that value was, or to move the Court to cause a local enquiry to be held. I think that the Principal Sudder Ameen came to a very reasonable conclusion upon the question, and that his judgment ought not to have been disturbed by the Judge, even if he had jurisdiction to disturb it. I think, therefore, that the decision of the lower Appellate Court must be set aside, and the case must be remanded to it, in, order to a re-consideration upon the merits. The plaintiff will be entitled to the costs of this appeal.

GLOVER, J.—I also think that the case should be remanded, on the ground that the *onus* of showing that the suit was over-valued was on the defendant and that the defendant altogether failed to discharge that *onus*.

Before Mr. Justice Phear.

BROADHEAD v. BROADHEAD.

Divorce, Suit for—Adultery—Wife's Costs.

1870
April 11.

Mr. Woodroffe applied in this case that the costs of the respondent should be paid by the petitioner. The suit was one brought by the husband for a divorce, on the ground of his wife's adultery. The marriage had taken place in 1866. The wife had at the time of the marriage no property of her own. Mr. Woodroffe referred to the case of *Kelly v. Kelly* (1).

Mr. Hyde contended that, as the marriage had taken place subsequently to the Indian Succession Act, section 4 of that Act applied, and the husband in that case would not be liable to pay his wife's costs. The principle in which the Courts in England ordered a husband to deposit a sum to meet the wife's costs was that the husband by marriage became entitled to the whole property of the wife. The wife in law could possess nothing, and the Courts in England, therefore, considering it right that she should have the means of prosecuting or defending a suit of a matrimonial nature, invariably ordered the husband when the wife had no separate property to deposit a sum for costs. Here the case was very different. Section 4 of the Indian Succession Act enacts that "no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried." East Indians married since the passing of that law neither acquire nor lose by marriage any right or interest in any property. The wife lost nothing by marriage, and might hold property, when married, as she did before. It might, therefore, be a question whether the Court under these circumstances would make any order for costs.

There was no evidence before the Court that the wife had any separate property, and PHEAR. J. granted the application, and made an order that the petitioner should deposit a sum for the respondent's costs.

Attorneys for the petitioner: Messrs. Sims and Mitter.

Attorneys for the respondent: Mr. Carapiet.

(1) 3 B. L. R., App., 5.

Before Mr. Justice Norman, and Mr. Justice E. Jackson.

SRINATH SAHA (PLAINTIFF) v. SARODA GOBINDO CHOWDHRY AND
ANOTHER (DEFENDANTS).*

1870
April 20.

Stamp. Want of—Act X of 1862, s. 14—Act VIII of 1859, s. 350—Appeal.

An Appellate Court has no power to reverse the judgment of a court of first instance merely on the ground that the document on which the suit was based did not bear a stamp at all.

Baboo Anukul Chendra Mookerjee and Bhawani Charan Dutt for appellants.
Baboo Annada Prasad Banerjee and Mahini Mohan Roy for respondents.

NORMAN, J.—The plaintiff sued to recover the sum of rupees 3,491, deposited with the defendants, with interest thereon.

A receipt was put in evidence by the plaintiff written on unstamped paper.

The first Court received the document, holding that it fell within the exception in clause 61, Schedule A, of Act X of 1862, as a receipt for money deposited at interest in the hands of a banker, and did not require a stamp.

On appeal, the Judge of Rajshahye reversed the decision of the first Court in favor of the plaintiff, on the ground that the document was in reality a bond, and required a stamp as such, and that the defendants were not bankers, and consequently that the document did not fall within the terms of exemption in clause 61.

Baboo Anukul Chandra Mookerjee, for the plaintiff who appeals, contended before us, that even if the Judge was right in holding that a document required a stamp, yet, under the provisions of the 350th section of Act VIII of 1859, the lower Appellate Court ought not to have reversed the decision of the first Court on that objection; the error in the decision on a mere question of stamp not being one which affects the merits of the case, or the jurisdiction of the Court. He cited two cases *Lalji Sing v. Syad Akram Ser (1)* *Mark Ridded Currie v. S. V. Mutu Ramen Chetty (2)*, which are expressly in point.

We think that those cases govern that now before us, and therefore we reverse the decision of the Judge with costs, and remand the case to the Judge for trial on the other issues.

* Special Appeal, No. 921 of 1869, from a decree of the Judge of Rajshahye dated the 8th February 1869, reversing a decree of the Subordinate Judge of that district, dated the 20th July 1868.

(1) 3 B. L. R., A. C., 235.

(2) 3 B. L. R. A. C., 126.

Before Mr. Justice Bayley and Mr. Justice Mitter.

MOKHA HARBAKRAJ JOSHI AND OTHERS (DEFENDANTS) v. BISESWAR DOSS (PLAINTIFF).*

1870
April 20.

Act VIII of 1859, s. 17, cl. 2—Recognised Agents.

A recognized agent, under clause 2, section 17, Act VIII of 1859, cannot prosecute or defend a suit in his own name.

A gomasta of a firm ceases to be a recognized agent under clause 2, section 17, Act VIII of 1859, when the business of the firm has ceased before the institution of the suit.

Baboo Anukul Chandra Mookerjee (with him Mr. M. L. Sundgal) for appellants.

Baboo Grish Chandra Ghose for respondent.

MITTER J.—The plaintiff, on the record of this case, calls himself the gomasta of certain native merchants, residing out of the local limits of the Court in which the suit was instituted, but having, as it is alleged in the plaint, a firm or house of business within those limits. The defendant objected to the power of the plaintiff to bring this suit, upon the ground that the business referred to by him had been stopped some time before the presentation of the plaint.

Both the lower Courts have held that this plea is not valid, upon the ground that although the firm had ceased to exist, the plaintiff was still entitled to maintain this action under clause 2, section 17, inasmuch as there are debts due to the firm which still remain to be collected.

We are of opinion that this decision is erroneous in law. Assuming for argument's sake, that the plaintiff is still entitled to consider himself as a recognized agent within the meaning of clause 2, section 17, Act VIII of 1859, that position would give him no power to maintain this action, as in his own name and person as plaintiff. Now the position of recognized agents is specified in section 16 as follows:

“All applications to any Civil Court, and all appearances of parties in any Civil Court, except when otherwise especially provided, shall be made by the party in person or by his recognized agent, or by a pleader duly appointed by him to act on his behalf.”

All that a recognized agent can do under this section, therefore, is to file applications or to enter appearance on behalf of his principal; but there is nothing in either of these two privileges which would entitle him to institute or to defend a suit, as plaintiff in the one case, or as defendant in the other; the same privileges are also given to pleaders duly appointed for the purpose: but then a pleader has no right to maintain a suit, as in his own person and name, when he has no personal interest in the matter.

* Special Appeal No. 1946 of 1869, from a decree of the Judge of Patna, dated the 31st May 1869, affirming a decree of the Subordinate Judge of that district, dated the 9th March 1869.

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v.
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DOSS.

We are further of opinion that the plaintiff is not entitled to be treated as a recognized agent within the meaning of clause 2, section 17, Act VIII of 1859. That section says that "persons carrying on trade or business for and in the name of parties not within the jurisdiction of the Court" shall be considered as recognized agents within the meaning of section 16 "in matters connected with such trade or business only." But it is admitted in this case that the firm is no longer in existence, and we are unable to see how the plaintiff can be now legally regarded as the gomasta of a firm which is no longer a firm. That the members of that firm have still to collect their dues, or to pay their liabilities, does not alter the fact of the non-existence of the firm. The words of the section are "carrying on trade or business;" and it is impossible to say that the plaintiff is still carrying on such trade, or business, or that his functions as a gomasta of the non-existent firm have not ceased to collect, even if there be outstandings. The plaintiff has produced nothing to show that he has been authorized to collect them.

It has been contended that this objection is a technical one. This is not so. What is there on the record of this case to show that the defendant is protected from being sued again by the alleged principals of the plaintiff upon the same cause of action? And how again is the defendant to execute any order which may be passed in his favor in this case, against those parties? The plaintiff in this case may be a man of straw for aught that we know, and it would be certainly unfair to the defendant if we allow this action to proceed.

It has been further urged that permission may be given to the plaintiff to amend the proceedings by making his alleged principals parties to the suit. We do not think that this request ought to be admitted now in special appeal. The objection was taken at the earliest stage of the case, and the plaintiff had ample opportunity to make any amendment he liked. It is too late now to ask for such an indulgence, and it would be just as convenient for his alleged principals to commence proceedings *de novo*.

For the above reasons, we reverse the decisions of both the lower Courts and dismiss this suit with all costs against the plaintiff personally, and not as the representative of his alleged principals.

Before Mr. Justice Bayley and Mr. Justice Miller.

ASKAR (DEFENDANT) v. RAM MANIK ROY AND OTHERS (PLAINTIFFS).*

Prescription, Right of—Permissive Possession.

1870
April 20.

To constitute a right by prescription, the possession must have been as of right. Mere permissive possession cannot be the basis of right of prescription.

* Special Appeal, No. 2046 of 1869, from a decree of the Officiating Judge of Tipperah, dated the 3rd June 1869, affirming a decree of the Sudder Moonsiff of that district, dated the 31st October 1867.

Baboo *Karuna Das Bose* for appellant.

Baboo *Ramesh Chandra Mitter* for respondent.

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ROY.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

MITTER, J.—The subject-matter of this suit is a small piece of land situated in a *hawt* or market. The plaintiff is the acknowledged owner of this land and he brought this action to recover possession of it by the removal of a shed or stall erected thereupon by the defendant.

The defendant's answer was that he has acquired a right by prescription to keep the shed upon the land in question, and to use it on market days for the purpose of vending commodities.

The lower Appellate Court has now found, after remand; that the defendant has acquired no such right, and a decree has been, accordingly, passed in favor of the plaintiff.

In special, appeal, it is contended before us that this finding is erroneous in law, inasmuch as it is admitted on all sides that the defendant and his predecessors have used the shed in question for a period of about twenty-five years, without the payment of rent or of any cess of any kind to the plaintiff. We are of opinion that this contention is not valid. A title by prescription may be acquired by long possession, it is true; but it must be a possession as of right, before it can constitute the basis of such a title. A man may allow his friend to live in his house for any number of years; but the friendly, *i. e.*, permissive character of the possession will always stand as a bar to the acquisition of any right by prescription. There is no express Legislative enactment on the subject of prescription in this country; but it has been held, that uninterrupted possession for a certain length of time, more or less, would constitute a title by prescription, only when it has been held in the capacity of a master, or in the case of easement, adversely to the owner of the land over which the easement is claimed. In the present case, the defendant admits that the plaintiff is the owner of the land, but he claims a mere right to use it for the purposes mentioned in his answer by virtue of long enjoyment. There is nothing, however, in the evidence produced by him to show that this enjoyment has been in any respect adverse to the plaintiff. His witnesses have stated, it is true, that no rent or cess of any kind has been paid to the plaintiff, but the whole tenor of their depositions goes to show that the user has been really of a permissive character. The right claimed by the defendant is a very peculiar and unusual one, and he has given us no information as to how such rights are acquired in similar cases, either in the *hawt* in question, or in any other *hawt* in the places adjacent or elsewhere.

In this state of facts, we are unable to say that the conclusion arrived at by the lower Appellate Court is erroneous, and we, accordingly, dismiss this special appeal with costs.

Before Mr. Justice Norman and Mr. Justice Mitter.

1870
April 20.

AGHORI RAMASARG SING *alias* DAU JHI (PLAINTIFF) *v.* J. COCHRANE AND ANOTHER (DEPENDANTS)* (1).

Mitakshara—Sale of Ancestral Property—Cause of Action.

According to the Mitakshara, a son has a right during the life-time of his father to sue to set aside alienations of ancestral property made without his consent. His cause of action arises from the date when possession is taken by the purchaser.

Baboo Annanda Prasad Banerjee and Rames Chandra Mitter for appellant.

Baboo Mohee Chandra Chowdhry for respondent.

NORMAN, J.—The plaint states that the plaintiff, Aghori Ramasarg Sing, sues for the establishment of his right of possession by determination of his title to 5 annas 4 pie of Mauza Bhutolia lands in Kadia and other properties, by cancelling certain deeds of conditional sale dated the 13th of September 1859, and a mortgage dated the 30th of August 1862, executed by the plaintiff's father, Aghori Ram Jhiram Sing, and for the recovery of future mesne profits; that the suit is brought on the ground that the mauzas in question were acquired by the great-grand-father and ancestors of the plaintiff; that Aghori Ram Jhiram Sing, who is made a defendant, had no right to alienate the ancestral property, without his (the plaintiff's) consent, and no right to pledge or sell the ancestral property without legal necessity; that the property was acquired by the plaintiff's great-grand-father out of his own funds, and out of the income of ancestral property; that the defendant, Aghori Ram Jhiram Sing, squandered his money in unauthorised expenditure, and in making a second marriage; and though the plaintiff was alive, alienated and pledged the property now in suit; that under the Mitakshara law, the defendant, Aghori Ram Jhiram Sing, had no right so to alienate or pledge the property, without the plaintiff's consent (1) there being no legal necessity for the alienation of the ancestral property and (2) the profits and income of the mauza being quite sufficient to cover all the necessary expenses of the family. Hence, he says, the plaintiff having brought this regular suit prays that, by determination of possessory right, justice may be administered to him.

The first Court, without going into the merits, dismissed the suit on two grounds: first, that it is under-valued; and, secondly, that the plaintiff should have sued for a declaration of the plaintiff's future right.

* Special Appeal, No. 2158 of 1869, from a decree of the Judge of Shahabad, dated the 17th July 1869, affirming the decree of the Subordinate Judge of that district, dated the 5th January, 1869.

(1) See Raul Gorain *v.* Teza Gorain, 4 B. L. R., App., 90.

The plaintiff appealed to the Judge who, without going into the first question, affirmed the decision of the Court below by which the suit was dismissed, on the ground that the suit could not be entertained during the life-time of the father; that the suit should have been for partition and for a declaratory order; and that, after the death of the father, the alienation made by him could not affect the plaintiff's right.

1870

AGHORI RAMA-
SING SING
v.
J. COCHRANE.

From this decision, the plaintiff has presented a special appeal to this Court.

The point taken is that the lower Appellate Court is wrong in holding that a suit in the present form will not lie, a son according to the Mitakshara being co-owner with his father.

We think it clear that the case must go back to the first Court, and be tried upon the merits.

According to the Mitakshara, a son in the life-time of his father has a right to sue to set aside alienations of the ancestral property made without his consent, and his cause of action arises from the date when possession is taken by the person in whose favor such alienation is made. See *Rajaram Tewary v. Latchman Persaud* (1), and the same case in the later stage (2), *Sadabart Prasad Bahu v. Foolbask Koer* (3).

The case must be remanded to the first Court.

Before Mr. Justice Bayley and Mr. Justice Markby.

MUSSAMAT JADU AND ANOTHER (PLAINTIFFS) v. SHEIKH HIFAZAT HOSSEIN AND OTHERS (DEFENDANTS). *

1870

April 22.

Stamp, Insufficient—Plaint, Return of—Act VIII of 1859, s 30—Jurisdiction.

Held in special appeal that the lower Appellate Court was right in setting aside the proceedings of the Moonsiff, on the ground that the property in suit was valued at an amount beyond his jurisdiction; but the plaintiff was entitled to have the plaint returned to him that he might present it with the proper additional stamp before the proper Court.

THIS was a suit for possession of 2 pies 5 krants share of Kusba hewan, in Pergunna Tara, &c., laid at rupees 159-6-9, being ten times the Government revenue, and for mesne profits, the total valuation of the suit being rupees 239-6-9.

The defence set up was (*inter alia*) that the suit was under-valued.

The Moonsiff held that, as the suit was for a fractional share, it was sufficient to pay stamp duties according to ten times the amount of the Government revenue; and that the defendants' objection to the insufficiency of the stamp duties, on the ground that the value of the property was greater, was not tenable. On the merits, he passed a decree in favor of the plaintiffs.

* Special Appeal, No. 2801 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 28th August 1869, reversing a decree of the Moonsiff of that district, dated the 10th March 1869.

(1) Case No. 228 of 1865; June 7th, 1867. (2) 4 B. L. R., A. C., 118.

(3) 3 B. L. R., F. B., 91.

1870

MUSSAMAT
LADU
v.
SHEIKH HIFAT
KHAN HOSSEIN.

On appeal, the Subordinate Judge held that, under Appendix (A), Act XXVI of 1867, suits respecting immoveable properties paying revenue to Government, valuation was to be made at ten times the jumma of the rent-roll, unless it was proved to the contrary; whereas, according to the plaintiffs' own allegation, it was evident that contrary was the case, inasmuch as the plaintiffs had stated in their petition that the approximate value of the property in suit is rupees 4,000; that when, from the statement of the plaintiffs themselves, it was evident that the value of the property far exceeded ten times its Government revenue, the suit ought to have been valued at the market value of the property in dispute; that if the suit had been properly valued, the Moonsiff would have had no jurisdiction. He accordingly dismissed the plaintiffs' suit.

The plaintiff appealed to the High Court.

Mr Gregory (Munshi Mahomed Yusuff with him) for appellants.

Baboo Taraknath Dutt for respondents.

The judgment of the High Court was delivered by

MARKBY, J.—We think that this special appeal should be dismissed with costs, because it has been found, although, no doubt, upon but slender evidence and upon an unguarded and unnecessary admission on the part of the plaintiffs' pleader, that the property in suit was valued at an amount beyond the jurisdiction of the Moonsiff; and therefore it is quite clear that, in entirely setting aside the proceedings of the Moonsiff, the lower Appellate Court was perfectly right.

But there is a question which is wholly independent and apart from this special appeal. The plaintiff, appellant, urges that he is entitled to the benefit of the stamp he filed for the plaint, and that the plaint ought to have been returned to him, in order to be presented with the proper additional stamp before the proper Court.

This seems to me to be a prayer which we ought to grant, and have power to grant, under the law, and which is contemplated by section 30 of Act VIII of 1859. I think that the true construction of that section is that, when it is discovered that there is an error in the plaint, the party should not lose the benefit of the stamp duty that he had already paid, but that he should have the plaint returned to him, in order that he may present it in the proper way. It is quite true that this ground is not taken in the petition of special appeal, but the question is, as has been before observed, apart from any consideration of the special appeal. The only doubt in this matter arises on a decision of Mr. Justice Seton-Karr and Mr. Justice Macpherson in *Shahid Musahur Ali v. Mussamat Basso* (1), but that is a mere expression of opinion apparently without argument.

In a case decided by Mr. Justice Bayley and Mr. Justice Hobhouse, *Nussurut Ali Chowdhry v. Mahomed Kanoo Sikdar* (1), where this point was argued, the learned Judges say that a Court of Appeal has power to make such an order; and if the lower Appellate Court has such a power, it is clear that this Court which has all the powers of the Court below, has also that power. On the authority, therefore, of the decision last cited, which is fully in support of the view that we now take, we are of opinion that this contention of the pleader for the special appellant is a proper contention; and that as soon as the error was discovered, the plaint ought to have been returned to him, whether that was discovered in the first Court or in appeal before the lower Appellate Court, or in this Court.

We dismiss the special appeal with costs, but direct that the plaint be returned to the plaintiff, in order that he may present it in proper form.

1870

MUSSAMAT
LADU

v.
SHEIKH HIFAZAT
HOSSEIN.

Before Mr. Justice Bayley and Mr. Justice Mitter.

SHEO GOBIND RAWUT (PLAINTIFF) v. ABHAI NARAYAN SING AND OTHERS
(DEFENDANTS).*

1870
April 26.

Valuation of Suit—Jurisdiction—Appellate Court.

When it appears, on appeal, that the suit has not been rightly valued, and, if rightly valued, the Court of first instance would not have had jurisdiction to try it, the Appellate Court may entertain the objection, though it had not been raised in the Court below.

THIS suit was brought in the Moonsiff's Court of Sarun, for recovery of possession of a one anna eight gundas share of Mauza Futehpore, valued at rupees 105, being ten times the Government revenue payable for the said share. The plaint disclosed that the market value of the whole property was about rupees 31,100.

The defendants took no objection to the valuation.

The Moonsiff, after trying it on the merits, dismissed the suit.

On the appeal of the plaintiff, the Judge held that since, from the statement of the plaintiff himself, it is evident that the value of the property in dispute far exceeds ten times the Government revenue, the claim should have been valued at rupees 2,700, being the proportionate value of the share sought to be recovered. That as the plaintiff had not done so, the suit had been undervalued, and the Moonsiff had therefore no jurisdiction to try the suit. He, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Baboo Kalikrishna Sen for the appellant.

Baboo Anukul Chandra Mookerjee for the respondent.

* Special Appeal, No. 2833 of 1869, from a decree of the Subordinate Judge of Sarun, dated 28th August 1869, affirming a decree of the Moonsiff of that district, dated the 31st March 1869.

1870

SHERO GOBIND
RAWUT
v.
ADHAI NARA-
YAN SING.

MITTER, J.—We see no reason to interfere with the judgment of the lower Appellate Court. It is admitted that the suit was under valued, and it is also admitted that if the claim were properly valued, the suit could not have been instituted in the Court of the Moonsiff who tried it in the first instance. Under these circumstances, the lower Appellate Court was right in reversing the decision of the Moonsiff, upon the ground that it was heard without jurisdiction.

It is contended that the objection as to valuation was not taken before the Court of first instance, but whether it was so taken or not, the jurisdiction of the Court by which the suit was heard, is admittedly affected, and the lower Appellate Court was, therefore, justified in taking up the point even though it was not urged by the defendant before the Court of first instance.

We dismiss the special appeal with costs.

Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

1870
April 28.

NILMADHAB KARMOKAR (PLAINTIFF) v. SHIBU PAL (ONE OF THE DEFENDANTS).*

Act VIII of 1869, s. 16—Act X of 1859, s. 6—Sale of a Tenure for Arrears—Right of Purchaser—Ejectment—Incumbrance by former Tenant.

A purchaser of a tenure sold under Act VIII of 1865 (B. C.), for arrears of rent, cannot, under section 16, eject a ryot who has acquired a right of occupancy, under section 6 Act X of 1859, under the former tenant.

Baboo Bamacharan Banerjee for appellant.

Baboo Girija Sankar Mazumdar for respondent.

HOBHOUSE, J.—The plaintiff in this case, who is the special appellant before us, became the purchaser at an auction-sale under Act VIII of 1865 (B. C.) of a certain under-tenure. The person who held that under-tenure, previous to the plaintiff's purchase, created an incumbrance on that tenure in the shape of a mokurrari lease, in favor of the defendant. After the acquiring of his purchase, the plaintiff sued to recover from the defendant khas possession of the land covered by the mokurrari. The Judge of the Appellate Court has found as a fact that the defendant has been at any rate more than twelve years the cultivator of the land, and has, therefore, further held, that the plaintiff

* Special Appeal, No 2851, of 1869 from a decree of the Judge of West Burdwan, dated the 4th September 1869, reversing a decree of the Moonsiff of that district, dated the 21st June 1869.

cannot, in the present suit, succeed in obtaining khas possession, that is, in ejecting the defendant.

1870

NILMATHAB:
KARMOKAR
v.
SHIBU PAL.

We were at first somewhat inclined to think that the Judge was wrong in this decision. But, on further consideration of the law, and on hearing the argument of the pleader for the other side, we are convinced that the Judge was quite right. The argument of the special appellant is this: he says, and says truly enough, that the mokurrari lease in question is an incumbrance, and he then says that, inasmuch as the defendant is the holder of that incumbrance, so if he has the right to get rid of that incumbrance, he has also the right to eject defendant, the person who is the holder of it. And he contends that the only way in which the defendant can escape from ejectment is by pleading to the first proviso in section 16, Act VIII of 1865 (B. C.), and by showing that he is a khudkast ryot, or else a resident and hereditary cultivator, within the meaning of that first proviso. But it seems to us that the proviso in question has nothing whatever to do with, and does not at all concern, the party before us. It is quite true that the Judge has found, or seems to find, that the defendant is not a khudkast ryot, and the Judge has certainly not found that the defendant is a resident and hereditary cultivator; but the Judge has found that the defendant is a ryot having a right of occupancy within the meaning of section 6, Act X of 1859; and this, we think, is sufficient to protect the ryot in this instance. The law, section 16, Act VIII of 1865 (B. C.), is couched in these terms:—"The purchaser of an under-tenure sold under this Act shall acquire it free from all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assigns, unless," as the law goes on to say, "the right of making such assignment is expressly provided for;" or unless the particular tenant against whom any suit may be brought is a tenant coming within the terms of the proviso to which I have above referred. Now, if the suit had been one on the part of the plaintiff, to declare that he was free from the incumbrance made by the late holder of the tenure, it is most likely that we should have held that the suit was a good one, and that we should have given the relief asked for, because the incumbrance in question was undoubtedly an incumbrance which had accrued by the act of the former holder, and which was not protected by any special right given under special agreement to make such incumbrance. But the defendant in this instance does not rely solely upon the incumbrance, if he indeed relies upon it at all. He says that he cannot be ejected, because he has a right of occupancy, a right expressly given to him by the provisions of Act X of 1859. The incumbrance to which section 16, Act VIII of 1865 (B. C.) refers, is not the person but the thing. The lease in this instance might possibly be avoided; but it does not follow that the man who holds that lease must necessarily thereby, and therefore, be ejected. The law does not say so, and on the contrary the provisions of Act X of 1859, on which defendant relies, protect a person, who, like defendant, has a right of occupancy.

1870

NILMADHAB
KARMOKAR

v.

SHIBU PAL.

In this view of the case we are confirmed by the decision of a Division Bench of this Court, *Puredag Sing v. Purtab Narayan Sing* (1). The appeal is dismissed with costs.

(1) *Before Mr. Justice L. S. Jackson
and Mr. Justice Markby.*

PUREDAG SING AND OTHERS (DE-
FENDANTS) v. PURTAB NARAYAN
SING (PLAINTIFF).*

The 18th March 1869.

Baboo *Upendra Chandra Bose* for
appellants.

Baboos *Nabakrishna Mookerjee* and
Bama Charan Banerjee for respondent.

JACKSON, J.—

The ground upon which I consider that we are called upon to interfere is this. The Judge has not, in my opinion, taken a correct view of the bearings of this case. The plaintiff alleged that he had purchased, at a sale in execution of a decree under Act VIII of 1865, the rights of a mokurraridar; that he had received formal possession from the officers of Court; but that the defendants, severally, had opposed him, and withheld possession of the land; and he, therefore, sued to obtain a decree by virtue of which they should be ejected from those lands.

The defendants, as I understand, severally disclaimed any right to hold the lands, so to speak, adversely to the plaintiff; but

contended that they were under-tenants of the lands severally in their possession, under good and valid leases from the last lessee, or, in some cases, previous to the accruing of the mokurraridar's right.

Now it seems to me, that, if the defendant succeeded in making out such allegations as those, the plaintiff ought not to have had a decree in this suit. It also seems to me, that if the Judge had understood this to be the real bearing of the case, he would have looked with a very different eye upon

the evidence which the defendants have adduced. It is not because the defendants have failed to show that the commencement of their holding was antecedent to the creation of the mokurrari, which the plaintiff had purchased, that therefore they were to be summarily turned out of the lands they were holding. But if they were under-tenants, *bona fide* holding and cultivating lands within this mokurrari, I should suppose that they would have been entitled to obtain possession of those lands until their holding was properly determined in due course of law. I think therefore, that the case ought to go back to the Zilla Court, in order that the proper issues may be considered, in this point of view, in the case of each of the defendants who have appealed.

* Special Appeal, No. 2400 of 1868, from a decree of the Judge of East Burdwan, dated the 1st June 1868, reversing a decree of the Subordinate Judge of that district, dated the 18th February 1868.

Before Mr. Justice Norman.

IN THE GOODS OF SHAMLAL DAS.

Administration, Certificate of—Act XXVII of 1860, s. 6.

1870
June 2.

THIS was an application for Letters of Administration, or for a fresh Certificate of Administration in supersession of one which had originally been granted by the Judge of the 24-Pergunnas, under section 6 (1) of Act XXVII of 1860.

NORMAN, J., ruled that, sitting on the original side of the Court, he could not grant the latter.

Before Mr Justice Norman

SMITH v. BOGGS.

Act XXIII of 1861, s. 8—Act VIII of 1859, ss. 273, 280.

1870
May 7.

Section 8 of Act XXIII applies only to applications made under section 273 of Act VIII of 1859, not to applications made under section 280.

THE prisoner was brought up on a writ of *habeas corpus*, and applied for his discharge under section 280, Act VIII of 1859.

Mr. Hyde for the plaintiff asked for a reasonable time for inquiry, and to enable the plaintiff to be prepared with the proof required by section 281.

Mr. Ingram for the prisoner contended that, if time was granted, his client should be let out of prison on undertaking to appear at the expiration of the further time granted, as provided by section 8 of Act XXIII of 1861.

Mr. Hyde contended that section 8 referred to a different case from the present, *viz.*, to the circumstances described in sections 273 and 274, for the latter of which it was substituted.

Mr. Ingram contended that section 8 was extensive enough to include both procedure in applications under section 273, and under section 280.

NORMAN, J., was of opinion that section 8 of Act XXIII of 1861 applied only to applications made under section 273 of Act VIII, *viz.*, for discharge from arrest in execution of a decree; and not to applications under section 280, where the applicant has been actually committed, and is brought up from the jail. A week's time was granted, and the prisoner remanded.

Attorney for the plaintiff: Mr. Dover.

Attorneys for the prisoner: Messrs. Carruthers & Co.,

(1) *Act XXVII of 1860, s. 6.*—"The other proceedings for the investigation granting of such certificate may be suspended by an appeal to the Sudder Court, which Court may declare the party to whom the certificate should be granted, or may direct such further proceedings for the investigation of the title as it shall think fit. The Court may also, upon petition, after a certificate shall have been granted by the district Court, grant a fresh certificate in supersession of the certificate granted by the district Court."

Before Mr. Justice Norman.

SMITH v. BOGGS.

1870
May 12.

Act VIII of 1859, s. 281—"Bad Faith."

Bad faith in section 281, Act VIII of 1859, means bad faith not only in respect of the application, but includes bad faith on previous occasions.

THIS was an application for discharge under section 280, Act VIII of 1859.

The defendant was up to 1868 a broker; but, failing in that trade, he had obtained a situation in Messrs Cohn, Feilmann's. It was stated by Mr. Hyde that he was in the habit of drawing his salary, which was rupees 400 a month, in advance, and particularly since the decree had been obtained against him. It was contended that he had done this in order to defeat the execution.

Mr. Ingram for the applicant contended that the bad faith mentioned in section 281 must be bad faith in respect of the application, and would not refer to bad faith in respect of any previous proceedings: *In re a prisoner* (1), *Oriental Bank v. Manimadhab Sen* (2). By section 282, the property of the defendant is still liable after his discharge.

Mr. Hyde, *contra*.—Bad faith means bad faith in respect of previous matters and not only with respect to the application: *In re Scoopersaud* (3), *In re Sibchunder Kurmohar* (4), and *Passmore v. The Calcutta Docking Company* (5).

NORMAN, J., said he was disposed to think that, by the words "bad faith," the Legislature intended something more than bad faith in respect of the particular application, and directed Mr. Hyde to proceed with his evidence.

The petitioner was then examined by Mr. Hyde, and proved that, though he had not paid anything to the plaintiff, he had paid many other creditors. For some time previous to his employment by Cohn, Feilmann, the petitioner had been earning very little.

Upon the facts, NORMAN, J., was of opinion that it was not proved that the petitioner in drawing his salary in advance did so from fraudulent purpose or that he had been guilty of any act of bad faith.

Attorney for the plaintiff: Mr. Dover.

Attorneys for the defendant: Messrs. Carruthers & Co.

(1) 1 I. J., N. S., 8

(2) 3 B. L. R., App., 14,

(3) 2 I. J., N. S., 91.

(4) 2 I. J., N. S., 93 note.

(5) Bourke, 75.

Before Mr. Justice Norman (Officiating Chief Justice) and Mr. Justice Markby.

1870
March 31.

RAJKUMAR PARAMANIK v. L. STEWART.

Reference from Small Cause Court—Costs—Act XXVI of 1864, s. 8.

Where a case had been referred from the Small Cause Court for the opinion of the High Court, at the request of the plaintiffs, and they neither deposited any security for the costs of the reference, nor appeared in the High Court, held, the case was not properly before the Court, and an application for costs by the defendant who did appear was therefore refused. See also 14 B. L. R. 180

This was a reference by the first Judge of the Calcutta Small Cause Court, under section 7, Act XXVI of 1864.

The case was referred at the request of the plaintiffs.

It appeared that no security or deposit for costs had been given as required by section 8 of Act XXVI of 1864 (1), and plaintiff did not appear.

Mr. Phillips, for the defendant, applied for costs, stating that he appeared on notice received from the Registrar.

The opinion of the High Court was delivered by

NORMAN, J. It—appears to me that this case ought not to have been sent up, security for costs not having been given.

You may have appeared for the protection of your client; it seems to me the case is not properly before the Court. It ought not to have been sent up at all.

Application for costs refused.

Attorneys for plaintiffs: Messrs Gray and Co.

Attorney for defendant: Mr. Oliver.

(1) Act XXVI of 1864, s. 8.—“When judgment is given contingent upon the opinion of the High Court, the party against whom such judgment is given, shall, unless he be willing to submit to such judgment, forthwith give security to be approved by the Clerk of the Court for the costs of the reference to the High Court and for the amount of the judgment; provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case, where the Judge of the Court of Small Causes, who tried the suit, shall have ordered the defendant to pay the amount of such judgment into the hands of the Clerk of the said Court, and the same shall have been paid accordingly; and the said High Court may either order a new trial in such terms as it think fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of reserving the question and stating the same for their opinion and otherwise arising thereout or connected therewith, as such High Court may think proper, and all orders made by the High Court under this section shall be final.”

1870
May 27.

See also
14 B.L.R. 180

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

F. DISSENT *v.* THE JUSTICES OF THE PEACE FOR THE
TOWN OF CALCUTTA.

Reference from Small Cause Court—Costs—Act XXVI of 1864, s. 8.

Where a case had been referred from the Small Cause Court for the opinion of the High Court, at the request of the plaintiffs, and they neither deposited any security for the cost of the reference, nor appeared in the High Court, *held*, the defendants, who appeared, were entitled to judgment and to an order that the plaintiffs should pay the costs of reference and other expenses connected therewith.

THIS was a reference by the first Judge of the Small Cause Court of Calcutta. Judgment had been given for the defendants contingent on the opinion of the High Court, upon a question which had been reserved at the instance of the plaintiff. It appeared no deposit or security for costs had been given in accordance with Act XXVI of 1864, section 8. The plaintiff did not appear in the High Court.

Mr. *Wilkinson* appeared for the defendants, and contended that the judgment of the Small Cause Court should be upheld with costs. He called attention to the case of *Rajkumar Paramanik v Stewart* (1).

The opinion of the High Court was as follows :

COUCH, C. J.—We think that in this case, as the plaintiff does not appear and the case was reserved upon the application of the plaintiff, and not by the Court on account of a doubt which the Court entertained, we may give judgment for the defendants, judgment having been given for them in the Court below. We also make an order under section 8 of Act XXVI of 1864 for costs. If a party asks the Judge of the Small Cause Court to refer a case and does not appear in this Court, he must be taken to have abandoned his case, and must have judgment given against him in this Court. Judgment will be entered for the defendants, and the plaintiff must pay the costs of reversing the question, and stating it for the opinion of this Court, and otherwise arising thereout, or connected therewith.

Attorneys for the defendants : Messrs. *Berners & Co.*

(1) *Ante*, p. 23.

Before Mr. Justice Bayley and Mr. Justice Markby.

SRI CHAND (DEFENDANT) v. NIM CHAND SAHU (PLAINTIFF).*

Co-proprietor—Injunction—Injury.

1870
April 11.

The defendant was in possession of land under a potta granted by the ijaradars of the proprietors, and thereon commenced to build a house and plant a garden. The plaintiff, who had bought the right, title, and interest of one of the proprietor's, sued to restrain him. He did not allege any injury. Held, that such suit would not lie.

THIS was a 'suit for the demolition of the walls of a house and for restraining the defendant from planting the garden and constructing the new house, which he was then building, on a parcel of land in Mauza Rostompore Shabpore, on the ground that the plaintiff had purchased the right, title, and interest of one of the proprietors, and that the defendant had been forcibly planting a garden and erecting a building on the land belonging to the talook.

The defence was that the defendant had obtained a potta from the ijaradars of the proprietors who had power to grant such pottas, and that the purchase of the plaintiff of a fractional share could not effect his right.

The Moonsiff held that the potta was proved; that the ijaradar had no power to grant such pottas; that, as the plaintiff was the holder of a small portion in a joint and undivided mauza, he had no right to advance his claim regarding the whole plot of land in dispute; that it would be a great hardship to pass any order, regarding the whole house and garden in a suit instituted by a party who was owner of a small fractional share. He, accordingly, dismissed the plaintiff's suit.

On appeal, the Subordinate Judge found that the potta alleged to have been granted by the ijaradar had not been proved; that the ijaradar had no power to grant a potta in perpetuity; and that the defendant had been planting a garden and erecting a building or house upon land, over which he had no right. He, accordingly, passed a decree in favor of the plaintiff for possession of the land by destroying the wall, house, and garden of the defendant.

The defendant appealed to the High Court.

Mr. R. T. Allan (with him Baboos Mahesh Chandra Chowdhry, Gopal Chandra Mookerjee, and Narsing Chandra Mitter) for appellants.

Mr. C. Gregory (with him Baboo Hem Chandra Banerjee) for respondent.

MARKBY, J.—It seems to me that, during the whole argument in this appeal the pleader for the respondent has persistently avoided the point upon which the Court long intimated to him that the decision of the case turns.

Upon many points involved in this case, it is unnecessary to pass any opinion whatever. The Moonsiff in the first Court held that this suit could

* Special Appeal, No. 1983, of 1869, from a decree of the Subordinate Judge of Patna, dated the 31st July 1869, reversing a decree of the Moonsiff of that district, dated the 30th January 1869.

1870
SRI CHAND
v.
NIM CHAND
SAHU.

not be maintained by the plaintiff. It was a suit brought in substance to stop the defendant from enjoying a property of which he was in possession, by preparing a house, and forming a mangoe garden upon it, and to have the building of the house stopped, and the wall and trees removed. The defendant's right to possession is not disputed, and it is alleged that he derived his title from certain tiocadars who again derived their title from the co-sharers of the plaintiff.

The first Court, therefore, lays down as a principle that one of several co-sharers cannot, without the consent of the other co-sharers, come in, and interfere with the enjoyment of the property by the defendant, who holds under a title derived from all. This view of the case is perfectly in accordance with a decision of Peacock, C. J., and Glover, J., in *Lala Biswambhar Lal v. Rajaram* (1). That case, it is true, arose as between two co-proprietors who were themselves in enjoyment of the property; but it seems to me that on principle the same rule applies where one of several proprietors is seeking to control the enjoyment of the property by the common tenant of all. The mode of dealing with the land as between co-proprietors is really what was in question in both the cases. The only point omitted by the Moonsiff is that he does not say in terms whether the defendant was doing any injury to the land, but no injury was ever alleged by the plaintiff, and I would observe that there could be no injury, and, therefore, this case appears to me to be exactly similar to the decision quoted above in which I fully concur.

I would add that in the case of *Nabin Ghandra Mitter v. Mahes Chandra Mitter* (2), decided almost at the same time, I expressed an opinion that were the question whether there is any injury done or not, the same principle would apply. It is not necessary in this case to decide that point, but as that case has been referred to, I have only to say that I still maintain the opinion that I therein expressed.

The judgment of the lower Appellate Court is reversed, and the plaintiff's suit dismissed with costs.

BAYLEY, J.—I think that the case of *Lala Biswambhar Lal v. Rajaram* (1), decided by Peacock, C. J., and Glover, J., should govern this case, the only difference being that the co-proprietors in that case and the representatives of the co-proprietors in this were the parties interested. In other respects there is no difference. The suit alleges no injury, asks for the relief of no injury, and in fact it is a suit in which one of several co-sharers, without the consent of the others, asks to have certain trees uprooted, and walls removed from the common land.

I agree in dismissing the plaintiff's suit and reversing the judgment of the lower Appellate Court, with costs of this Court and of the lower Appellate Court.

(1) 3 B. L. R., App., 67.

(2) 3 B. L. R., App., 111.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

SODAMINI DASI (JUDGMENT-CREDITOR) v. JAGESWAR SUR (JUDGMENT-DEBTOR).*

Act VIII of 1859, s. 233—Seizure of Moveable Property—Mode of Executing Warrant against Moveable Property—Removing Locks.

1870
April 13.

Under Section 233, Act VIII of 1859, a Nazir, authorized to execute a warrant by attachment of moveable property, has power to remove locks put by the judgment-debtor on the doors of godowns, or other places where his property is stored, and put his own locks thereon, for the purpose of attachment and safe custody of the property.

THE following case was submitted by the Judge of the Small Cause Court of Hooghly for the opinion of the High Court :—

"The decree-holder applied for execution of a decree of this Court, praying that such of the moveable properties of the judgment-debtor, as may be pointed out by her, be attached and sold in satisfaction of her decree.

"The Court treating the application as one within the latter part of section 214, Act VIII of 1859, issued a warrant to the Nazir, authorizing him to attach the defendant's property, wherever the same could be found, to the amount of the judgment and costs. The Nazir having proceeded to execute the warrant, reports that the moveable property of the judgment-debtor pointed out by the decree-holder consists of lime locked up in *gola*, and asks for the Court's special authority to break open the door of the *gola* for the purpose of seizing the same.

"As it is doubtful whether, in execution of a process of attachment issued by a Civil Court, the door of any house can be broken open, I request the favor of the Court's instruction on the point.

"There is no express provision either in Act XI of 1865, or Act VIII of 1859 under which the Small Cause Court can order the door of any house to be forced open; at the same time, if the mere locking of a door be a sufficient protection against the process of the Court, a judgment-debtor might evade the seizure of his property in execution, by taking the precaution of putting all his things in a house, and locking it up as soon as he hears that a process of attachment of his property has issued. But, however desirable it may be that the Court should have such power, as in the old law relating to summary proceedings for the recovery of rent (Regulation XVII of 1793), there being no provision in the Code of Civil Procedure sanctioning and prescribing the mode in which seizure of moveable properties by breaking open the doors of the houses is to be made, I am inclined to entertain the opinion that seizure in the above mode cannot be effected."

The opinion of the High Court was delivered by

JACKSON, J.—I think the question put by the Judge of the Small Cause Court in this case, must be answered in the affirmative, and that the Nazir is empowered

* Reference, No 8 of 1870, from the Judge of Small Cause Court of Hooghly, dated the 16th March 1870.

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to remove a lock placed upon the door of a *gola* for the purpose of attachment and safe custody of the property. Section 233, Act VIII of 1859, which is part of the provisions for execution of decrees for money, by attachment of property provides that, "when the property shall consist of goods, chattels, or other moveable property in the possession of the defendant, the attachment shall be made by actual seizure, and the Nazir or other officer shall keep the same in his own custody, or in the custody of his subordinates, and shall be responsible for the due custody thereof."

It seems to me that the direction of the law that requires and authorises the attachment to be made by actual seizure, authorizes the Nazir, or other officer of the Court, to do everything that is necessary to reduce such property into his possession; and as he is required to keep the property in his own custody, or in the custody of his subordinates, and is responsible for the due custody thereof, it follows, as a matter of necessity, that he should be enabled to remove any lock upon a door, or from any receptacle in which the property is placed, and to place his own lock thereon, in order that he may keep the property in proper custody. As pointed out by the Judge, if the law were otherwise, it would be the easiest thing possible for a judgment-debtor to evade execution by attachment of his personal property by simply placing the whole of his property under a single lock and key.

1870
April 25.

Before Mr. Justice Norman and Mr. Justice Markby.

RAMFAL SHAW v. BISWANATH MANDAL AND OTHERS.

Advocate—Witness.

THIS was a reference from the First Judge of the Calcutta Small Cause Court on the following question:—

"Whether one, Ramanath Law, who, though an attorney, had acted as advocate for the plaintiffs, and pleaded their case in Court, could be examined as a witness in the case?"

The Judge admitted the evidence on the authority of *Cobbett v. Hudson* (1), and gave judgment in favor of the plaintiffs. The question was reserved at the request of the defendants.

Mr. *Macrae* for the plaintiffs referred to the case above cited, and to section 14 of the Evidence Act II of 1855, which mentions the only persons who are incompetent to be witnesses.

NORMAN, J.—I think it quite plain that the witness is competent; if there had been any doubt on that point, the doubt would have been removed by a reference to the section of the Evidence Act to which Mr. *Macrae* referred. The plaintiff will be entitled to the costs, in the Small Cause Court, of reserving the question of stating the same for the opinion of the High Court and of the argument before us.

Attorneys for plaintiff: Messrs. *Swinhoe & Co.*

Attorneys for defendant: Messrs. *Sims and Mitter.*

(1) 1 E. & B., 11.

Before Mr. Justice Bayley and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF RANI UMASUNDARI DEBI.*

24 & 25 Vict., c. 104, s. 15—*Power of the High Court—Review of Order refusing Petition to sue in Formâ Pauperis.*

1870
May 6.

A Court of original jurisdiction has power to entertain an application to review an order refusing a petition for leave to sue *in formâ Pauperis*.

Under section 15 of 24 & 25 Vict., c. 104, the High Court set aside an order of a Court of original jurisdiction, refusing to entertain such an application on the ground that the Court has not jurisdiction to entertain it.

IN this case Rani Umasundari Debi had obtained a rule *nisi* on a petition, which shewed that the petitioner applied to the Court of the Subordinate Judge of Zilla Midnapore, for permission to bring a suit, *in formâ pauperis*, against her husband, for the recovery of alimony; that the said Court, after seeing no reason to refuse the application on any of the grounds stated in section 304, Civil Procedure Code, fixed the 15th day of January last for receiving such evidence as the petitioner might adduce in proof of her pauperism, and for hearing any evidence which the opposite party might bring forward in disproof of the pauperism of the petitioner: that, being now a resident of Bowanipore, the petitioner forwarded two of her witnesses from the said place of her residence, with a view that they should give evidence as to her pauperism on the said 15th January, in ample time to reach the Court before the day fixed for hearing; that one of the witnesses, named Thakur Das Roy, was attacked with cholera on the way to the Court at Ulubariah, and the other was necessarily detained to take care of the sick; that, in the mean time, the Subordinate Judge struck off the petitioner's application, on default, on the 18th; that the petitioner, on coming to know about the illness of the said witness and the detention of the other, sent instruction to her agent at Midnapore to file an application for re-hearing of the case, on the cause before assigned; that as the petitioner is a pauper, and as none of the lawyers take up her case warmly, on the 14th February last, a petition was made to the Subordinate Judge to re-hear the matter of the petitioner's pauperism; and that the Subordinate Judge refused to hear the petitioner's application, on the ground that, under Chapter V, Act VIII of 1859, he had no jurisdiction to entertain a petition for re-hearing on cause shewn or for entertaining a second application to sue *in formâ pauperis*. The petitioner prayed the High Court to exercise the power given to it by section 15 of the Chapter Act (1), and to direct the Subordinate Judge to entertain the application as to whether the petitioner's witness had not been detained in the way to the

* *Rule Nisi* No. 332 of 1870.

(1) 24 & 25 Vict., c. 104.

1870

IN THE
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Court, as one had fallen ill, and the other was detained to watch him; and if so, then to hear the evidence as to her pauperism, and decide the matter.

Upon hearing the petition, BAYLEY and KEMP, JJ., granted her a rule nisi calling upon the opposite party to show cause why the Subordinate Judge should not be directed to enquire as to whether there were good and sufficient grounds for the delay alleged by the petitioner, and, if satisfied, why he should not examine the witnesses as prayed for.

Baboo *Annada Prasad Banerjee*, *Anukul Chandra Mookerjee* and *Purna Chandra Shome* now showed cause. They contended that the petitioner had had ample time to produce her evidence, but had neglected to do so.

Baboo *Tarrak Nath Sen* and *Gupi Nath Mookerjee* for the petitioner.

The judgment of the Court was delivered by

BAYLEY, J.—We think this rule must be made absolute. The Subordinate Judge is wrong to have held, as the only reason for his refusing jurisdiction. that, after a careful study of Chapter V of the Civil Procedure Code, he considers himself debarred from allowing the re-hearing of a pauper application. It is quite within the discretion of the Subordinate Judge to allow the pauper application or not. But before granting the application in this case the Subordinate Judge must carefully, see whether, under the circumstances of this case, there was good and sufficient cause for the delay, that is to say, whether it was owing to circumstances beyond the lady's control that the delay occurred; and that on knowing the cause of the delay she immediately took measures to inform the Court and prosecute the case in its proper light. Without proof of this the petition should not be granted.

Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

1870

May 11.

EMAUDDIN KHAN (DEFENDANT) v. RAMKISSORE KOWAR
(PLAINTIFF).*

Valuation of Suit—Appeal.

When a suit has been admitted upon a certain stamp, tried, and decreed for the plaintiff, "under valuation" is no ground for dismissing the defendant's appeal.

THIS was a suit to recover possession of certain land before the Moonsiff of Sarun. The defendant pleaded, *inter alia*, that the suit had been instituted on an insufficient stamp.

The Moonsiff, however, said "It does not appear that the institution of this suit has caused any loss to Government in respect of the stamp duties;"

* Special Appeal, No. 3025 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 28th September 1869, affirming a decree of the Moonsiff of that district, dated the 25th February 1869.

and went on to try the case on the merits. He gave a decree for the plaintiff. The defendant appealed to the Judge who, on the 28th September 1869, passed the following judgment :

" Before this, on the grounds mentioned in a proceeding of the 9th instant an order was passed to the effect that appellant should make up the deficiency of the stamp duties of the petition of appeal in proportion to the amount under claim, rupees 666, up to the 25th idem ; and that then the appeal should be tried. But as he has not complied with that order up to this date, the petition of appeal is rejected ; and it is, accordingly, ordered that the appeal be dismissed with costs ; and that the respondent's costs with interest up to date of realization, be borne by the appellant."

The defendant appealed specially to the High Court.

Baboo Bama Charan Banerjee for the appellant.

Baboo Debender Narayan Bose for the respondent.

HOBHOUSE, J.—The Judge is quite wrong in this case. If the plaint was under valued, objection should have been taken in the first instance, and then the Court could have proceeded on the matter of under valuation in the mode prescribed by law. But the plaintiff was allowed to put in his suit on a certain valuation, the suit was determined by the first Court on that valuation, and it is not until the defendant comes up in appeal that the Court curiously enough rules that the defendants must suffer for the laches committed by the plaintiff. It is quite clear that the Court was wrong in rejecting the defendant's appeal on the ground of under valuation, and we direct that his judgment and his decree be set aside, and the case be remanded to be tried on the merits.

The costs to follow the final result of the case.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

BHINJI GOVINDJI v. MONOHAR DAS,

Pledge—Possession—Seizure—Interpleader Suit—Costs.

1870
June 22.

A. obtained a decree in the Small Cause Court against B. In execution of the decree, goods belonging to B., but in the possession of a pledgee, were seized by a bailiff of the Small Cause Court. The pledgee brought an interpleader suit under section 88 of Act IX of 1850 to recover the goods. Held, the pledgee was entitled to have the goods released to him, and have the costs of his suit paid by the execution-creditor.

THIS was a case referred for the opinion of the High Court by the first Judge of the Calcutta Court of Small Causes, under section 7 of Act XXVI of 1864. The case was referred at the request of the plaintiff, and was thus stated by the Judge referring it :—

"In this suit, which was an interpleader suit under section 88 of Act IX of 1850, the plaintiffs claimed as pledgees, to recover three bales, Nos. 869, 875,

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and 867, marked J. A. M., of long cloth, seized under a writ of execution of this Court, dated 11th May 1870, or the value thereof, rupees 1,000.

"In my judgment I declared that the plaintiffs had a *bond fide* pledge on the property attached by the defendants, and ordered that their claim should be dismissed, but that the right, title, and interest of the judgment-debtor should alone be sold.

"I delivered judgment subject to the opinion of the High Court on the following question, viz.: 'It having been found that the money was advanced, and that the pawn was a *bond fide* one, and that the goods were in the possession of the pawnee at the time of the seizure, and that the time of the pawn had not then expired, whether the learned Judge was not wrong in point of law in not ordering the property to be released to the plaintiffs (pawnees) and whether he ought not to have ordered the defendants (the execution-creditors) to pay the plaintiffs their costs."

The Judge in his judgment says: "The only case I can find directly in point is that of *Rogers v. Kennay* (1), and that is certainly in favor of the plaintiff's contention. But it appears to me that that case went astray on a point of pleading, and the judgment appears to have been based on *Legg v. Evans* (2) which is stated by Lord Denman to have been directly in point. This it clearly was not, the intention in that case having been to sell the special property of the judgment-debtor in the general property of an unconcerned person, while in *Rogers v. Kennay* (1), as in the present case, the object is to sell goods which are the general property of the judgment-debtor, but to sell them subject to the special property of a third person in them with which special property it is not desired at all to interfere. But whatever may be thought of the doctrine of the interpleader claimant's special property in cases of trover and detinue as applied in *Rogers v. Kennay* (1), it appears to me that there is a peculiarity in the case before me which renders the bearing of those forms of action entirely inapplicable. The bailiff of this Court has seized the goods, but has not removed them, and will not do so. The goods are now, and have all along been, and will be up to and after the sale, in the possession and custody of the interpleader claimant, the pawnee, though no doubt they are also in the custody of the law. Under these circumstances it appears to me that neither trover nor detinue would lie, it being impossible to allege conversion. Until the expiry of the period for which the goods were pawned, the interpleader claimant has no other right over the attached goods, and that right has not been and will not be disturbed."

Mr. Hyde (for the plaintiffs) contended that the goods were not liable to be taken in execution, as long as the bailment lasted. Story on Bailments, section 353, page 290. The authorities there cited are all American cases, with the exception of *Coggs v. Bernard* (3), which is not in point. Property held in right of a lien cannot be attached—*Legg v. Evans* (2). The interest of the

(1) 9 Q., B. 592.

(2) 6 M. & W., 36.

(3) 2 Ld., Raymd, 909

pawnee does not cease by reason of sale or repledge by him—*Halliday v. Holgate* (1), *Donald v. Suckling* (2), and *Rogers v. Kenney* (3). The right of sale is a right which all pawnees have, but it would be impossible to exercise that power while the goods were under seizure.

No one appeared for the defendants.

The opinion of the High Court was delivered by

— COUCH, C. J.—The Judge of the Small Cause Court does not appear to doubt that the plaintiffs have a special property in these goods which entitles them to possession, but he says that the goods not having been removed from their possession and not going to be removed, they are still in possession of the property, although at the same time the goods are in possession of bailiffs of the Court, and in the custody of the law. But these two possessions cannot be reconciled. The possession of the bailiffs in execution of the decree of the Small Cause Court is of such a character that it cannot exist at the same time as the possession of the plaintiffs, who are pledgees. By section 69 of Act IX of 1850 "the bailiff executing any process of execution against the goods of any person, may, by virtue thereof, seize and take any of the goods of such person (excepting the necessary wearing apparel and bedding of such person or his family, and the tools and implements of his trade);" and by section 73, the goods are to "be deposited by the bailiff in some fit place or to remain in the custody of a fit person, approved by the Judges to be put in possession by the bailiff." All this is inconsistent with the goods being still in the possession of the plaintiff, and in our opinion the Judge of the Small Cause Court is clearly wrong in saying that the possession of the plaintiffs has not been interfered with. Then he appears to have considered that there was no conversion, and that the plaintiffs had no cause of action until the expiry of the period for which the goods were pawned. The seizure of the goods while they were in the possession of the plaintiffs, was sufficient to entitle the plaintiffs to maintain this suit. It is true the bailiff did not seize the goods for his own use; still it was dealing with the goods in a way which was inconsistent with the right of the plaintiffs. The case of *Rogers v. Kenney* (3) is quite in point, and did not proceed on the ground of the form of action, but was really on the principle of the law. The seizure by the bailiff in this case was a seizure out of the possession of the plaintiffs.

The question which is put to us is "whether the learned Judge was not wrong in point of law in not ordering the property to be released to the plaintiffs (pawnees), and whether he ought not to have ordered the defendants (the execution creditors) to pay the plaintiffs their costs." We think we must answer the first question by saying that the learned Judge was wrong in point of law in not ordering the goods to be delivered to the plaintiffs; and if he

(1) 3 L. R. Ex., 239.

(2) 1 L. R., Q. B., 585.

(3) 9 Q. B., 592.

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should have ordered that, we think that he should also have ordered the execution creditors to pay the plaintiffs' costs. We, therefore, answer the whole question in the affirmative, and order that the judgment be entered for the plaintiffs, as prayed for in the plaint, with costs of suit. The plaintiffs will also have the costs of reversing the question and stating the same for the opinion of this same Court, and otherwise arising thereout or connected therewith, to be taxed by the Taxing Officer of this Court.

Before Mr. Justice Norman.

1870
June 6.

ORD v. ORD.

Alimony, Permanent.

Principle on which the Court will grant permanent alimony.

THIS was an application for permanent alimony. Mr. Justice Phear had upon an application for alimony *pendente lite*, estimated the respondent's income at rupees 600 per month, and ordered rupees 200 a month as alimony *pendente lite*. The wife had brought the suit against her husband for judicial separation on account of his adultery, and obtained an order for judicial separation. The affidavit put in, in support of the application, showed that the marriage took place in October 1860, the husband at the time being an assistant in the petitioner's late husband's business which he had left to his wife; that from his marriage up to the end of 1868, the profits of the business were estimated at rupees 2000 per month, but after that time, they had decreased to about one-half that amount; that from June 1867 to March 1869, the respondent did not afford the petitioner any adequate means of support; that in March 1869, she accordingly obtained an order from the Police Magistrate that her husband should pay her rupees 50 a month as maintenance; that he failed to pay this sum after the first three months, and had only made payment on her taking out a summons to compel him to do so; and that he was living in adultery at the time of the application. The income of the respondent at the time of application was stated to be rupees 1,000 per month, and an advertisement in one of the daily papers was referred to in which the respondent stated that he wanted a partner in his business, guaranteed him rupees 700 per month.

The respondent filed an affidavit in opposition to the application, in which he stated that the petitioner had left his protection, taking away with her property amounting to about rupees 4,000; that he had incurred liabilities in consequence of a suit by his wife with respect to property she alleged to be her separate property, but which suit had been dismissed by the Appeal Court; that these liabilities, together with others incurred by reason of litigation in respect of his wife, amounted to rupees 13,000, in respect of which he was paying interest at the rate of rupees 125 a month; that he had paid rupees 1,500 into Court to cover his wife's costs in the present suit; and that he had sup-

ported his wife, by monthly payments of rupees 50, from March. 1869 to May 1870.

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He also stated that the property brought him by his wife was of the value of about rupees 7,000, and that the petitioner's former husband was insolvent at the time of his death, and the respondent had paid off his creditors.

Mr. Hyde for the petitioner.—For permanent alimony more may be given than for alimony *pendente lite*, for which a sum not exceeding one-fifth of the husband's income is fixed. By section 37 of the Indian Divorce Act, a sum is to be awarded, which may be thought reasonable by the Court, looking to the wife's fortune (if any), to the ability of the husband, and to the conduct of the parties. Here the husband has a good business; his conduct has been exceedingly bad, and the wife is admittedly free from all suspicion of wrong. In addition to this, the business carried on by the respondent was established out of funds originally belonging solely to the petitioner, and acquired by the respondent by virtue of his marital rights on his marriage. The case is therefore one in which the Court will grant the highest amount of alimony which it can award. It only remains to see what that is. Where the separation is on account of the misconduct of the husband, the English cases show that the wife is entitled to a moiety of the husband's income: *Deane v. Deane* (1), *Smith v. Smith* (2), *Cooke v. Cooke* (3). The first English Divorce Act, 20 and 21 Vict., c. 85, makes by section 22 the rules and precedents of the Ecclesiastical Courts applicable to the Divorce Court, and the Indian Divorce Act makes the English rules and precedents applicable. The petitioner is, therefore, entitled to one half of the husband's income.

Mr. Phillips for the respondent.—The money brought by the wife into the business is all spent; by the suits she has brought against her husband, he has incurred expenses to the amount of rupees 13,000, on which he has to pay the monthly sum of rupees 125. If half his income is awarded as alimony, it will send him into the Insolvent Court. In making an order for permanent alimony, the amount should be what the wife would receive if living with her husband; the means of the husband are to be taken into consideration; and his misconduct is no ground for increasing the amount; Pritchard on Divorce, 11. According to the English cases, more than a moiety of the husband's income cannot be given. Where that proportion, the utmost that can be given, is given, it is on account of special circumstances in the case. In the case of *Deane v. Deane* (1), there were eight children living apart from the husband and his income was not gained by his personal exertions. The proportion given is always much smaller when the husband is gaining his income by his personal exertions: see the judgment in *Cooke v. Cooke* (3). That is the case here. In *Cooke v. Cooke* (3), a bad case was made against the husband, yet not more than half was given. The general rule appears to be to give one-third: *Haigh v. Haigh* (4).

(1) 1 S. & T., 90.

(2) 2 Phill., 235.

(3) 2 Phill., 44, 45.

(4) 38 L. J. P. & M., 37.

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Mr. Hyde in reply.—The misconduct of the parties is to be taken into consideration in awarding permanent alimony, as is expressly laid down by section 37 of the Indian Divorce Act. The misconduct of the husband has been of the worst possible kind. He has spent all the money he got with his wife, without affording her any adequate means of support, and he is living in adultery. One-half of his estimated income should be given.

NORMAN, J.—I have ascertained from Mr. Justice Phear that, in making the estimate he did of the amount of the respondent's income, he did it in such a manner as to be well within the mark; and that if I am to make an allowance for any such sum as rupees 125, I should have to take a higher estimate. Evidence has been read before me, and from that it appears that the respondent's average income amount to rupees 1,000 a month. The result is that I think, I shall be justified in taking his income at rupees 600 a month, as found by Mr. Justice Phear. Many excuses have been put forward by Mr. Ord, to which I attribute no weight. His statement that his wife carried away rupees 4,100 would have been brought forward before the Magistrate on her application for maintenance if it could have been.

The statement as to the insolvency of Mrs. Ord's former husband is vague and uncertain. It is no answer whatever to the finding come to after careful examination of the books by Mr. Justice Phear as to the amount of respondent's income, with which I see every reason to concur. I think there is a good deal in what is said in some of the cases as to a distinction being taken where the income is mainly dependent on the husband's exertions. See the cases in 2 Phillimore, 44. In this case the present income appears to depend principally on the husband's own exertions, and I shall therefore not order that the full moiety be awarded as permanent alimony, to which otherwise, I think Mrs. Ord fully entitled. I think I shall do justice between the parties, and treat Mrs. Ord with the liberality to which she is entitled in giving her rupees 250 a month; and looking at the difficulties that have been thrown in her way at every step by Mr. Ord, I think I am justified in directing that this sum be made a first charge on the good-will and stock-in-trade of his business as an undertaker. Under the powers conferred by section 37 of the Indian Divorce Act, I direct that a deed be executed by the respondent charging the good-will and stock-in-trade of his business as an undertaker with the payment of rupees 250 a month to Mrs. Ord, and I direct that he do so pay rupees 250 a month to her as permanent alimony, and the costs on scale No. 2 as between party and party of and incidental to this application. The order for alimony will be included in the decree for judicial separation, and the alimony itself to run from the date of that decree.

Attorneys for the petitioner : Messrs. Sims and Mitter.

Attorney for the respondent : Mr. Moses.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

HARASUNDARI DASI (PLAINTIFF) v. KISTU MANI CHOWDHRAIN
AND OTHERS (DEPENDANTS).*

March 7.
1870

Act VIII of 1865 (B. C.), s. 16—Shareholder—Purchaser of Rights of Holder of Fractional Share.

Section 16 of Act VIII of 1865 (B. C.) (1) does not apply to the purchaser of the rights and interests of the holder of a fractional share in an under-tenure.

Baboo *Rames Chandra Mitter* for appellant.

Baboo *Kali Mohan Das* for respondents.

NORMAN, J.—The facts of this case, as I understand them are as follows :—Shib Chandra Roy, Nidan Chandra Roy, and Ram Chandra Roy were possessed of a certain mehal No. 88, consisting of Manzas Agyhatta and Roondhan, under a title which the first Court finds to be as patnidar, and the lower Appellate Court apparently treats as a maurasi talookdar.

A katkabala of one-third of this property was granted to one Jadubindr, who obtained a decree after foreclosure and got possession.

Two-thirds of the mehal in question were sub-let by Shib Chandra and Nidan Chandra to Kamal Lochan Nandi in patni.

In execution of a decree against Kamal Lochan, one-fourth of his tenure was sold to Kalikant Lahori, and three-fourths were sold to Chandra Nath and Haranath, who were thus in possession of three-fourths of two-thirds, equal to one-half or eight annas of the mauza in dispute. Chandra Nath's share, four annas, was purchased by the plaintiff on the 30th of Asar 1254 (13th July 1847).

* Special Appeal, No. 2792 of 1868, from a decree of the Subordinate Judge of Pubna, dated the 8th August 1868, affirming a decree of the Officiating Sudder Ameen of that district, dated the 20th March 1868.

(1) *Act VIII of 1865 (B. C.), s. 16*—"The purchaser of an under-tenure sold under this Act shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such in cumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees. Provided that nothing herein contained shall be held to entitle the purchaser to eject

khudkast ryots, or resident and hereditary cultivators, nor to cancel *bond fide* engagements made with such class of ryots or cultivators aforesaid by the late incumbent of the under-tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor. Nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof through whose default the tenure was brought to sale."

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DASI

v.

KISTU MANI
CHOWDHRAIN.

The plaintiff was dispossessed by the defendant, Kistu Mani Chowdhraïn, on the 20th of November 1866. The defendant's supposed title to possession is as follows :—

Shib Chandra Dutt and others, the zemindars, having obtained a decree for rent against Nidan Chandra, the right, title, and interest of Nidan Chandra, viz., 5 annas, 6 gandas, 2 cowries, and 2 krants, in the property in dispute was sold in execution of the decree, and purchased by the defendant, Kistu Mani. The sale purports to have been made under Act VIII of 1865 (B. C.).

The Subordinate Judge finds that, on the application of the decree-holder, a prayer was made for the sale of the right and interest of Nidan Chandra Roy in the property in dispute, and that the sale certificate expressly records that such right and interest were sold. And it has been shown to us, by reference to the proceedings and to the sale certificate, that this finding is correct. The Subordinate Judge however, refers to section 16 of Act VIII of 1865 (B. C.) (*reads*). He says that there was no proof that permission was given to Nidan Chandra and others to grant the land in patni to the person under whom the plaintiff claims, viz., Kamal Lochan; and therefore he assumes that the defendant, Kistu Mani, purchased the property free from all incumbrances, and, affirming the judgment of the first Court, dismisses the plaintiff's suit. The Subordinate Judge says that no distinction is made in section 16 of Act VIII of 1865 between the purchaser of the whole and a part of the mehal.

The reason is simply this :—that the section in question makes no mention whatever, and appears therefore not to apply to sales of portions of tenures.

The purchaser of a portion or fractional share in an under-tenure is not the purchaser of the under-tenure any more than the purchaser of a house in a village is purchaser of the village. The Subordinate Judge's mistake is the more remarkable, because the Collector had, in express terms, sold only the rights and interests of Nidan Chandra in the under-tenure. We think that, by the sale of the right and interest of Nidan Chandra, the purchaser, Kistu Mani Chowdhraïn, acquired only such rights as Nidan Chandra possessed at the time of the sale, and that therefore she took, subject to the rights of the persons now interested, under the patni granted by him to Kamal Lochan.

The result will be that the appeal must be decreed, and the decision of the lower Appellate Court reversed with costs, both in this Court and in the lower Appellate Court.

The case must be remanded to the lower Appellate Court for trial of the remaining issues.

Before Mr. Justice Phear and Mr. Justice Mitter.

THE QUEEN v. MAHENDRANATH CHATTERJEE AND ANOTHER.*

Code of Criminal Procedure (Act XXV of 1861), ss. 407, 426.

1870
May 28.

A. was charged with the offence of voluntarily causing hurt to C. and B. was charged with the same offence, and also with the offence of abetting A. The Magistrate found A. guilty of the offence, and sentenced him to three months rigorous imprisonment. The Magistrate also found B. guilty of abetment of the offence of voluntarily causing hurt to C., and sentenced him to one month's rigorous imprisonment and a fine.

On appeal, the Sessions Judge held that there was no evidence to convict A. and he accordingly released the prisoner. The appeal of B., however, was rejected on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt, and, therefore under section 426 of the Code of Criminal Procedure, the sentence could not be reversed. No "error or defect either in the charge in the proceedings on trial" was alleged.

Held (by MITTER, J.) that section 426 of the Code Criminal Procedure did not apply,

MAHENDRANATH CHATTERJEE was charged before the Contonment Magistrate of Barrackpore of voluntarily causing hurt to one Gaurmohan Ghose, and abetting one Jan Bax in causing hurt to the said Gaurmohan; and Jan Bax was charged with the offence of voluntarily causing hurt to the said Gaurmohan.

The Magistrate found Mahendranath Chatterjee guilty of abetment of the offence of voluntarily causing hurt to Gaurmohan, under sections 109 and 323 of the Indian Penal Code, and Mahendranath was sentenced to one month's rigorous imprisonment, and a fine of rupees 200, or, in default to one month's rigorous imprisonment.

The Magistrate also found Jan Bax guilty of voluntarily causing hurt to Gaurmohan, and thereby punishable under section 323 of the Indian Penal Code, and Jan Bax was sentenced to three months rigorous imprisonment.

On appeal by Jan Bax and Mahendranath, the Sessions Judge of the 24. Pergunnas passed the following order:—

The finding and sentence as regards the appellant, Jan Bax, are reversed, and he will be immediately released. The appeal of Mahendranath is rejected, but the conviction will be held to be of the offence of causing hurt.

In passing the order, he said:—

"It has been urged in appeal for Mahendranath that he is entitled to acquittal as he has been convicted against the evidence; but in the first place he was charged with causing hurt, as well as abetting it, and in the next place section 426 of the Procedure Code forbids the reversion of a sentence, on the ground that the evidence proves a different offence. It appears to me impos-

*Reference, No. 59 of 1870, from the Session Judge of 24-Pergunnas, dated the 17th May 1870.

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sible to say that Mahendranath has been prejudiced by the conviction abetment, instead of the substantive offence. Moreover, as it appears on the evidence that both appellants were present at the time, the guilt of both was the same; the finding must depend on the same evidence, both for the prosecution and for the defence; and Mahendranath as pleaded to the charge of the substantive offence."

Mahendranath applied to the High Court for revision.

Baboo *Amirindar Nath Chatterjee* for the prosecutor.

Mr. *Montrieu* (Baboo *Iswarchandra Chuckerbutty* with him) for the petitioner.

PARAR, J.—In this case the record has been brought up before us on an application for revision, and we are asked to quash the conviction, substantially on the ground that there was no legal evidence upon which the conviction could properly be made to rest.

The case came before the Session Judge on appeal; and the Judge was clearly of opinion that the evidence did not support the conviction which the first Court had made. He thought, however, that the evidence did establish the offence laid in the alternative charge; and inasmuch as the punishment which had been awarded was not an improper punishment for that offence he allowed the conviction to stand. I must add that this is my interpretation of what the Sessions Judge in effect did, for he states in his judgment that the conviction will be held to be for the offence of causing hurt.

The judge acted, as he says, under the provisions of section 426, Criminal Procedure Code.

It appears to me that, under that section, supposing that section to apply, the learned Judge being of opinion that the prisoner ought to have been found guilty of an offence other than that of which he was really found guilty, had no power to alter either the finding or sentence, and ought therefore to have confined himself simply to dismissing the appeal; I take it therefore that, in law, that is the effect of his judgment.

Mr. *Montrieu* for the prisoner has argued very forcibly that, inasmuch as the prisoner had been substantially, though not in express terms, acquitted by the first Court of the offence of which the Sessions Judge considered the evidence to prove him to be guilty, therefore, even under section 426, the lower Appellate Court could not rightly allow the conviction to stand, for obviously the result of doing so would be, at any rate so far as the opinion of the lower Appellate Court is concerned, that the prisoner would be convicted and punished for an offence of which he had been acquitted by the first Court, and thus the prosecutor would indirectly obtain all the advantage of a successful appeal against an acquittal, notwithstanding that the Criminal Procedure Code

expressly forbids an appeal in such case. It appears to me that this argument is very strong; but having regard to the matter on this record, I do not find it necessary to pass a judicial opinion upon it.

During the discussion of the case, I threw it out, as the inclination of my opinion, that this section is in terms confined in its operation to the cases where error or defect, either in the charge or in the proceedings, is the foundation on which the alteration of the finding or sentence is sought; and I still feel very great difficulty in coming to the conclusion that the finding of a prisoner guilty without evidence upon one charge, and acquitting him of another charge to which the evidence is really directed (that which has happened here) is either an error or defect in the charge or in the proceedings. It appears to me to be an error in the exercise of judicial discretion, and I could not bring myself without more consideration than I have been able to give to this case to say that an error of that kind, when the proceedings are otherwise regular, is covered by the words of this section. I believe, however, there is no doubt that some division Benches of this Court, and certainly some of the other High Courts in India, have given a larger construction to the words of this section. But, as I have already said, I don't think that, on the facts of this case, I am obliged to give a judicial opinion with regard to this point.

The prisoner stands convicted of a charge which there is no evidence, according to the judgment of the Appellate Court, to support; and in that judgment so far I entirely concur.

It is clear, on looking through the depositions, that, if the witnesses are to be believed at all, the offence committed by the prisoner was an assault on the prosecutor with his (the prisoner's) own hand. There is literally no evidence to support the second charge of abetment. Therefore the record being now before us on revision, and it appearing therefrom that the prisoner has been acquitted of the assault, and convicted of the abetment, I think there is such an error in the record as to vitiate the conviction, and such that we ought to reverse that conviction, unless section 426 intervenes and we are of opinion that the evidence makes out that the accused person ought to have been found guilty of another offence for which the sentence passed is appropriate.

Now, on looking into this evidence (assuming that section 426 applies), I think that it is entirely unworthy of credit, and it appears to me also not difficult to discover how the first Court came to this, at first sight, extraordinary conclusion, namely, that, notwithstanding the testimony of the eye-witnesses, it was safer to find the prisoner guilty of abetment, than to find him guilty of the actual assault.

* * * * *

Without going further into the details of their depositions, I will at once state that I feel the evidence to be utterly untrustworthy with regard to this point. The first Court certainly disbelieved the evidence of the three women,

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with respect to the assault being committed by the hand of Mahendranath Chatterjee; and I think the first Court was right.

I therefore agree with the Appellate Court that there was no evidence upon which the prisoner could be found guilty of the offence of which he was, in fact, found guilty, and I also agree with the first Court that the evidence which went to support the other charge ought not to be believed; it follows, therefore, that even if this case falls within the scope of section 426, there exists no ground upon which the conviction can be upheld; consequently the conviction must be quashed; and as the prisoner is out on bail, the bail-bond or other security must be cancelled.

MITTER, J.—I concur in the order proposed by my learned and honorable colleague; but I would prefer to rest my judgment on the ground that this case is not governed by the provisions of section 426 of the Criminal Procedure Code.

The petitioner, Mahendranath Chatterjee, and one Jan Bax, a Cabuli, were tried before the Cantonment Magistrate of Barrackpore on the following charges: namely, first, that they had voluntarily caused hurt to one Gaurmohan Ghose; and, secondly, that he, Mahendranath, had abetted the commission of that offence.

The evidence for the prosecution went to show that the blow which caused the hurt had been struck by the prisoner, Mahendranath, himself. The Cantonment Magistrate was of opinion that this evidence was not worthy of credit. But, instead of releasing the prisoners then and there, as he ought to have done upon this view of the evidence, the Cantonment Magistrate went upon some conjectural grounds set forth in his judgment to find the Cabuli guilty of the offence of voluntarily causing hurt to Gaurmohan Ghose, and the prisoner, Mahendranath, of having abetted the commission of that offence. Against this decision, both the prisoners appealed to the Sessions Judge of the 24-Pergunnas; the ground of appeal in both cases being that there was no evidence to support the conviction of the prisoners on the charges of which they had been respectively convicted.

The Sessions Judge has acquitted the Cabuli, on the ground that there is no evidence to prove that the Cabuli had caused the hurt complained of. With reference to Mahendranath Chatterjee, the Sessions Judge was of opinion that the evidence on the record was sufficient to prove that he had struck the blow by which the hurt was caused; and being of that opinion, the Sessions Judge has refused to interfere with the sentence passed on Mahendranath under section 426.

I am not quite prepared to say whether this Court, sitting as a Court of revision under section 404, has any right to enter into the question whether the view of the evidence taken by the lower Appellate Court is correct or not. But I express no opinion on this point, because I think that the application of section 426 to this case by the Sessions Judge was not legal.

It has been contended before us that, although the Cantonment Magistrate of Barrackpore disbelieved the evidence of the witnesses for the prosecution, no formal verdict of acquittal has been recorded by him in favor of Mahendranath on the first charge, namely, that he, Mahendranath had voluntarily caused hurt to Gaurmohan Ghose.

This circumstance does not in my opinion affect this case one way or the other. If the Magistrate was of opinion that the evidence against the prisoners was not sufficient to support the charge, he was legally bound to record a verdict of acquittal. But his omission to do so cannot affect the interests of the prisoner in any manner whatever. This point has been ruled by a Full Bench of this Court in the case of *Queen v. Toyab Sheikh* (1). In that case the prisoner was tried by the Sessions Judge for two distinct offences, namely, for the offence of murder, as well as for culpable homicide not amounting to murder. The Sessions Judge convicted the prisoner of the last offence; and it was held by this Court that, although a formal verdict of acquittal had not been recorded to the offence of murder, the Sessions Judge had substantially acquitted the prisoner of that offence. It being clear, therefore, that the Magistrate had substantially acquitted the prisoner of the offence of causing hurt to Gaurmohan, we will now proceed to see whether section 426 applies to this case. The words of that section have already been quoted by my learned and honorable colleague; and so far as I can understand them, I am bound to say that they have no bearing upon this case.

The prisoner did not appeal to the Sessions Judge, on the ground that there was "any error or defect in the charge," or on that of any irregularity in the proceedings held at the trial. If he had done so, the Sessions Judge might have, under section 426, declined to interfere if he found from the record that the punishment awarded by the Magistrate was not an improper punishment for the offence of which the accused person ought to have been convicted. But if he found that there was no evidence to support the charge of abetment which was the only charge of which the prisoner had been convicted by the Magistrate, the Sessions Judge should have set aside the conviction, and acquitted the prisoner. There was no error or defect in the charge, and consequently the prisoner did not complain of any.

The proceedings had been conducted regularly throughout, and consequently the prisoners did not and could not complain of any irregularity in those proceedings. But the prisoner had a substantial ground of complaint, namely, that the offence of which he had been convicted was not supported by any evidence on the record, and the Sessions Judge himself admits that this ground was valid.

To allow the Sessions Judge, in a case of this description, to exercise the discretion vested in him by section 426 would be to act directly contrary to the provisions of section 407. That section says that, "there shall be no

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appeal against a judgment of acquittal," and the appeal in the present case being restricted to a judgment of conviction for a particular offence, all that the Sessions Judge had to do was to see whether that conviction was supported by the evidence or not; for he had no power to enquire whether the prisoner had been properly or improperly acquitted of the other charge for which he was tried by the Magistrate.

I do not think that the provisions of section 426 were ever intended by the Legislature to override that great principle of Criminal Jurisprudence, which says that no man's life or liberty ought to be jeopardized twice for the same offence. In the Full Bench case already cited by me, it has been held that this Court has no power, either as a Court of revision or as a Court of appeal, to convict a prisoner of an offence for which he has been already tried and acquitted by a Court of competent jurisdiction; and I do not think that the Sessions Judge had any power to do that indirectly which he is not competent to do directly according to the principal laid down in that case.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Kemp.

C. J. DUMAINE (PLAINTIFF v. UTLAM SING (DEFENDANT)).*

Act X of 1859, s. 13—Notice—Special Appeal.

1870.

May 26.

In a suit for enhancement of rent, it was objected, on behalf of the defendant, in special appeal, that service of notice had not been proved. Held, the question was one of fact, and the objection ought therefore to have been taken in the Court of first instance.

Mr. R. E. Twidale for appellant.

Baboo Iswar Chandra Chuckerbutty for respondent.

The judgment of the Court was delivered by

COUCH, C. J.—With regard to the objection taken by the pleader for the defendant (respondent) with reference to the ruling of the Full Bench in the case of *Akhoy Sankar Chuckerbutty v. Raja Indra Bhusan Deb Roy* (1) to the effect that service of notice has not been proved, we think, as already observed in the course of the argument, that it is now too late to entertain that objection, nor do we think the defendant competent to take it in the lower Appellate Court on remand. It is an objection which ought to have been taken in the Court of first instance. The question as to whether notice was given or not is a question of fact; and if the objection had been taken at the proper time, the plaintiff would have had an opportunity of proving

Special Appeal No. 2954 of 1869, from a decree of the Judicial Commissioner of Chota Nagpore, dated the 18th September 1869, reversing a decree of the Assistant Commissioner of that district, dated the 3rd May 1869.

that notice had been given. Section 13, Act X of 1859, says that such notice shall be served on the application of the person to whom the rent is payable; and although the title of the plaintiff accrued only three days before the suit was commenced, it is possible that the notice might have been given by the zemindar who was the person to whom the rent was payable and that might have been shown if the objection had been taken at the proper time.

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Before Mr. Justice Kemp and Mr. Justice E. Jackson.

IN THE MATTER OF THE PETITION OF NABA KUMAR BANERJEE.*

1870
July 2.

Code of Criminal Procedure, (Act XXV of 1861), s. 36—Removal of a Case by the Magistrate from the File of a Subordinate Magistrate.

Interference by the High Court in a case where the Magistrate had improperly exercised his discretion in removing a case from the file of a Deputy Magistrate.

Baboo Hem Chandra Banerjee for petitioner.

KEMP, J.—The prisoner in this case is one Naba Kumar Banerjee, a late stamp-vendor of the Moonsiff's Court of Serampore. It appears that the Nazir of the Sub-Division of Serampore had absconded with certain property and moneys in his charge, in respect of which a charge was laid against him. There were also, it appears two register books of stamps missing; and the prisoner, Naba Kumar Banerjee, being suspected of having something to do with the books being missing, is charged with the theft of the said registers by the Deputy Collector of Serampore. The case was made over for trial to the Deputy Magistrate of Serampore. The Deputy Magistrate, after taking the evidence for the prosecution, recorded his opinion that the discrepancies in the evidence for the prosecution were of so glaring a nature that it was impossible to sustain the charge brought by the prosecution against the prisoner, Naba Kumar Banerjee; but as the mooktear for the prosecution had asked the Court to postpone the case to enable him to procure copies of the evidence, stating that he would then be able to show to the Deputy Magistrate that the prisoner ought not to be discharged, he appears to have acceded to the request of the mooktear, and admitted the accused to bail. On another occasion, the mooktear for the prosecution appears to have made a similar application, and the case was again postponed. After the Deputy Magistrate had given the above expression of opinion, the case, it appears, was suddenly removed from his file by the Officiating Magistrate of Hooghly.

*Miscellaneous Criminal Appeal, No. 47 of 1870, from an order of the Deputy Magistrate of Serampore, dated the 13th April 1870.

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In the order removing the case, no reasons whatever have been given for doing so. The transfer is made under section 36 of the Code of Criminal Procedure; and although that section does not say that the Magistrate is bound to give any reasons, and enacts that the Magistrate is competent to withdraw any criminal case from any Court subordinate to such Magistrate within his district or division, and to try the case himself, or to refer it for trial to any other such Court competent to try the same, we think that, under the circumstances of this case, considering that the case was complete, and that the Deputy Magistrate had expressed an opinion that the evidence for the prosecution was not sufficient to support the charge, the Magistrate has not exercised a wise or proper discretion in removing this case from the file of the Deputy Magistrate of Serampore to that of the Joint Magistrate of Hooghly. When the case came upon a former occasion, before the Chief Justice and myself, we thought it necessary to call upon the Magistrate to show cause why he had acted in this manner, and he has now submitted an explanation. He refers, first, to the fact of the Deputy Magistrate being to a certain extent subordinate to the prosecutor; secondly, to a rumour that the Deputy Magistrate had made improper remarks to a mooktear in the cases thirdly, that the Deputy Magistrate, residing in a small place like Serampore and being in a position to hear much talk and rumour about the case, was unfit to try it; and, fourthly, that his amlas were related to parties in the case. These reasons, we think, are wholly insufficient for removing the case from the Deputy Magistrate's file at the late stage at which it was so removed. They may be very good reasons for not making the case over to the Deputy Magistrate, but not sufficient reasons after he had expressed an opinion unfavorable to the prosecution to suddenly withdraw it from his file. We think therefore that the Magistrate has not acted wisely in removing this case from the file of the Deputy Magistrate to that of the Joint Magistrate of Hooghly. It will therefore be replaced on the file of the Deputy Magistrate, who will dispose of it in due course.

Before Mr. Justice L. S. Jackson and Mr. Justice E. Jackson.

GURU PRASAD ROY AND ANOTHER (DEFENDANTS) v. RAI BABOO DHANPAT SING (PLAINTIFF).*

1870
June 2.

Cause of Action—Suit to Recover Money advanced on a Bond before the Money became due—Failure to Register a Bond—Breach of Agreement.

A. executed a bond in favor of B., but failed to cause the registration of the same. Before the amount secured by the bond became due, B. sued A. for recovery.

* Special Appeal, No. 698 of 1870, from a decree of the Officiating Judge of Moorshedabad, dated the 28th December 1869, modifying a decree of the Subordinate Judge of that district, dated the 27th August 1869.

thereof' on the ground that, as A. had agreed to get the bond registered, but failed to do so, B. was entitled to recover the amount advanced by him.

Held, that B. had no cause of action.

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v.
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DHANPAT
SING.

THIS was a suit to recover a certain sum of money with interest, on the ground that the defendants who had agreed to have the bond, upon which the money was borrowed, registered, had failed to do so. By the bond, certain immoveable property was mortgaged as security for the defendants. The defendants admitted the execution of the bond, as well as the receipt of the money. They denied having made any contract with the plaintiff, and the breach thereof; they stated that they were ready to have the deed registered, but that owing to a disagreement between their mooktear and the mooktear of the plaintiff, the bond had not been registered. They submitted that the plaintiff was not justified in the institution of the present suit before the expiry of the period fixed for the repayment of the loan.

The Subordinate Judge found that it was proved that the defendants had agreed to have the bond registered as it contained a clause whereby certain immovable property was pledged as security; that the deed was not registered, owing to the refusal of the defendant's mooktear to pay the costs of registration. He accordingly held that the defendants had either voluntarily or negligently failed to register the bond, and that they must be concluded to have broken their agreement, and that this had given rise to the plaintiff's cause of action. He passed a decree in favor of the plaintiff.

On appeal, the Judge held that the facts upon which the judgment of the lower Court was based were proved; and that the plaintiff had a good cause of action. He accordingly confirmed the decree of the lower Court.

The defendants appealed to the High Court.

Baboo *Shamlal Mitter* for the appellant contended that the plaintiff had no cause of action to sue for recovery of the amount secured by the bond before expiry of the time mentioned therein. The money had not fallen due. All that the plaintiff could do was to enforce registration.

Baboo *Srinath Das* (Mr. *Allan* with him for the respondents).—When at the time of the advance it was agreed that the defendants would cause the bond to be registered, inasmuch as, without registration, the plaintiff would lose the benefit of the real property covered by the bond, and the defendants afterwards neglected or refused to perform their part of the contract, the breach was such as rendered the whole contract void. It was perfectly equitable, that the parties should be placed in the original position. The contract on the part of plaintiff could not be binding.

L. S. JACKSON, J.—It appears to me that the plaintiff in this case had no cause of action, and that the decision of the Court below upon his plaint is erroneous, and must be set aside.

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GURU PRASAD
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RAI BABOO
DHANPAT
SING.

The plaintiff, it is alleged, lent a sum of money to the defendants on a bond, in which bond it was stipulated that certain immoveable property belonging to the defendants was pledged as security for the repayment of the loan, with interest. It was alleged that the defendants also agreed, verbally, to have this document registered; and the evidence shows that the document was, in fact, taken to the Registry Office; but that as the defendants did not appear, and their mooktear did not consent to registration, the document was returned to the plaintiff although there was no formal note by the Registrar refusing to register endorsed upon it. Upon this, the plaintiff considers that, the defendants having broken the contract, he is entitled to put an end to it, and he sues to recover the money lent, although the due date, which is in the month of Srabān 1277 (July and August 1870) has not arrived.

Both the lower Courts consider that the refusal of the defendants to register gave the plaintiff a cause of action, which entitles him to recover the money lent. It appears to me that it did not; and that the conduct of the defendants (of which the account given is somewhat obscure) was such as would entitle the plaintiff to come before the Zilla Court, on the Registrar refusing to register, and, under section 84 of the Registration Act, apply by petition to establish his right to have such document registered.

It cannot be said that the refusal of one of the parties to the contract, to carry out a verbal agreement not contained in the contract, enables the other party at his option to set aside the contract *in toto*.

It may be contended that the period allowed by law, for registration of the document, having expired, the plaintiff has now lost his security. That, it appears to me, will not enable the Courts to grant the plaintiff the relief which he asks for in this suit. I think he has lost, by his own negligence, the security which the bond originally provided; and that if he is now reduced to a bare suit for his money when it becomes due, he has only himself to blame.

The judgment of the Courts below must be reversed with costs.

E. JACKSON, J.—I also think that the judgment of the Court below must be reversed. I think the plaintiff's proper course was to have enforced registration of the bond.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
July 25.

THE QUEEN v. HIRALAL SING AND OTHERS (PRISONERS).*

Code of Criminal Procedure (Act VIII of 1869), s. 435—Power of a Magistrate in dealing with a case when dismissed without full and sufficient enquiry.

Semble.—When a charge is dismissed by a Subordinate Magistrate without enquiry a Magistrate has no power, under section 435 of Act VIII of 1869, to order a trial before another Magistrate, but can only order a commitment to the Court of Session.

* Criminal Miscellaneous Appeal, No. 69 of 1870, against the order of the Sessions Judge of Moorsheadabad, dated the 7th March 1870, affirming an order of the Deputy Magistrate of that district, dated the 12th February 1870.

Mr. Hyde (with him Baboo Jadab Chandra Seal) for the prisoners.

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QUEEN
v.
HIRALAL
SING.

JACKSON, J.—The petitioners were charged with an offence under section 148, Indian Penal Code, which is an offence triable before the Court of Session, or the Magistrate of a district. The charge in the first instance was preferred before Mr. Fisher, who seems to be a Subordinate Magistrate. This officer, after examining certain witnesses, discharged the accused. The case however, being brought to the notice of the Magistrate of the district, Mr. Hankey, he was of opinion that the proceedings of the Subordinate Magistrate had been hurriedly and carelessly taken, and observed that the complainant was entitled to have his witnesses examined; and he, therefore, acting under the powers conferred by section 435, Act VIII of 1869, ordered a further enquiry into the complaint, and directed that the case be made over for trial to another Magistrate, who, as I understand, exercises the full powers of a Magistrate. That Magistrate convicted the accused, and sentenced them to imprisonment and fine. The accused appealed to the Court of Session, objecting, amongst other things, to the proceedings, on the ground that they were not warranted by section 435 of the Code of Criminal Procedure. The Sessions Judge, however, overruled this objection; and, going into the merits of the case, confirmed the conviction and sentence. The case is now brought before this Court, under section 404 of the Code of Criminal Procedure, and we are asked to set aside the proceedings of the Magistrate, on the ground of their being contrary to law. It is contended that the Magistrate of the district was not warranted in dealing with this case as one which had been dismissed without enquiry. It is further contended, that, supposing the Magistrate to have been authorized to deal with the case, the only order that he could make was an order of commitment to the Court of Session.

The Magistrate, under the amended section 435, has, like the Court of Session, power of dealing with cases in which an accused has been discharged by any Magistrate, and also cases in which a complaint has been dismissed without enquiry, always under the condition that the Magistrate, whose proceedings are the subject of notice, is a Subordinate Magistrate. The Magistrate of the district has dealt with the case as if the complaint had been dismissed without enquiry; and the Sessions Judge takes the same view of the case.

There is authority in a ruling (1) (which, though, perhaps, not a judicial ruling of this Court, is contained in a letter written by way of direction to a sessions Judge) dated August 15th, 1865, for saying that a complaint, dismissed without sufficient and full enquiry, may be considered as dismissed without enquiry. I am inclined to think that this authority warranted the Magistrate of the district in dealing with the case as he did. If not, however, it is clear that he would still have authority to order a commitment, or do

(1) 3 W. R., Criminal Letters, 21.

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whatever is implied in the term "like powers," and a question may arise what precisely is contemplated by those words, namely, whether it is intended expressly to limit the Magistrate of the district to order a commitment to the Court of Session, or to enable him, by analogy, to take order for the trial of the case before some competent Court of Criminal Jurisdiction. I incline, upon the whole, to the construction that a Magistrate is bound to order a commitment, and is not authorized to order a trial before another Magistrate.

But whatever view may be taken of the previous part of the section, I think we are precluded from disturbing the proceedings of the Court below, by reference to sections 426 and 439 of the same Act. Section 462 says:—"No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error or defect, either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence of which, in the judgment of the Appellate Court, the accused person ought, upon the evidence, to have been found guilty, or unless, in the judgment of the Appellate Court, the accused person shall have been prejudiced by such error or defect;" and section 439 provides:—"No trial in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice."

In this case, the parties appear to have been tried and convicted by a Court of competent jurisdiction. It seems to me that, unless we are of opinion that the irregularity, supposing an irregularity to have occurred, has been productive of failure of justice, we ought not to set aside the trial, or to reverse the sentence by way of revision.

It is not shown that anything of the sort has occurred, and I think, therefore, that this application must be disallowed.

Before Mr. Justice Loch and Justice Sir C. P. Hobbhouse Bart.

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May 25.

H. PRICE (CHAIRMAN OF THE HOWRAH MUNICIPALITY) (DEFENDANT) v. KHILAT CHANDRA GHOSE (PLAINTIFF)*

Act III of 1864 (B. C.), s. 87—Act VIII of 1859, s. 2—Res-judicata—Limitation—Suit against Municipal Commissioners for Possession of Land.

Previous to the institution of the present suit, one of the shareholders of a piece of land brought a suit against the Chairman of the Municipality for recovery of possession of his share. The other shareholders were made *pro forma* defendants in the suit. This suit was dismissed as barred by the Law of Limitation. After the dismissal of the suit, the plaintiff brought the present suit for recovery of his share of the land, on the allegation that his

* Special Appeal, No. 2930, from a decree of the Subordinate Judge of Hooghly, dated 4th October 1869, reversing a decree of the Moonsiff of Salkhia, dated the 31st March 1869.

tenant had relinquished the land within three months in consequence of his having been dispossessed by the Municipal Commissioners.

Held, that the suit was not barred by section 2, Act VIII of 1859; and that section 87, Act III of 1864 (B. C.), did not apply.

Semle.—Act III of 1864, s. 87 (B. C.), relates only to actions brought in respect of acts done by the Commissioners under that Act for the purpose of the Act.

THIS suit was instituted by the plaintiff on the 12th September 1868 against the Chairman of the Howrah Municipal Committee to recover possession of two katas and 13 chittaks of land claimed by him as proprietor of the six-sixteenths share of the zemindari in Boro Pykan, on the allegation that the land in dispute was a part of his *chur* land held by him; that his tenant had been dispossessed therefrom by the defendant who stacked stones thereon; that the tenant had relinquished the land; and that the cause of action had arisen on the date of such relinquishment, *vis.*, 15th June 1868.

The defence set up was that the suit was barred by lapse of time; that the Government had all along been in possession of the land in dispute, and had held the same for more than twelve years as part of Salkhia Banda Ghat. Also that, under section 87 of the Municipal Act (I) III of 1864 (B. C.), the suit was barred.

The Moonsiff held that, as it was held by the High Court, 18th May 1868 in a suit brought by the 10-anna-shareholders against the Municipal Commissioners that they were out of possession since Bhadra 1272 B. S. (August 1865), and as the land in dispute was a part and parcel of the land then in suit, the cause of action must be reckoned to have arisen from August 1865, or at least from the date on which the plaintiff was served with a summons in that suit as a *pro forma* defendant; and as the present suit was instituted after a lapse of more than three months from that date, the suit was barred under section 87, Act III of 1864 (B. C.). He accordingly dismissed the suit.

On appeal, the Subordinate Judge held that section 87 of Act III of 1864 did not bar the suit, inasmuch as the land in dispute was in the occupation of the plaintiff's tenant, and that the cause of action had arisen only on his relinquishment of the holding; and that as the suit had been brought within three months from the date of such relinquishment, it was not barred. He accordingly remanded the case for the trial of the remaining issues.

Baboo Jagadanand Mookerjee, for the appellant, contended that all suits against a body of Municipal Commissioners should be brought within three

(1) Act III of 1864 (B. C.), section 87.—“No action shall be brought against the Municipal Commissioners or any of their officers, or any person acting under their direction, for anything done under this Act, until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Commissioners, or at the place of abode of such person, explicitly stating the cause of action and the name and

place of abode of the intended plaintiff; and unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within three months next after the accrual of the cause of action, and not afterwards; and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover.”

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months from the date on which the cause of action arose—section 87, Act III of 1864 (B. C.); that as the plaintiff had been made a party defendant in the suit brought by his shareholders, he was aware of the act of dispossession; that it was found by the High Court in the suit of his shareholder, *Poorno Chunder Roy v. Balfour* (1), and wherein the plaintiff was a party defendant, "that the land was in the possession of Government for more than twelve years as part of the public road at and near the public ghat." The suit having been brought after a lapse of three months from the date of such dispossession, or from the date that he became aware of the fact, the suit was barred. The relinquishment of the plaintiff's tenant could not give rise to a cause of action against a stranger.

Mr. Allan (Baboo Bhairab Chandra Banerjee with him), for the respondent, contended that the decision in *Poorno Chunder Roy v. Balfour* (1) was passed upon the merits of the case, and did not lay down any ruling as to the Law of Limitation; that section 87, Act III of 1864 (B. C.) applied to questions of damages, and was not applicable to cases where the possession was in dispute; that the fact of the plaintiff having been made a party defendant in the suit by the co-sharer cannot be pleaded as a bar to the present suit. No issue, as between the present plaintiff and defendant, was decided in the suit of *Poorno Chunder Roy v. Balfour* (1).

Baboo Jagadanand Mookerjee in reply.

The judgment of the Court was delivered by

LOCKE, J.—The plaintiff in this case sued to recover possession of a certain portion of land of which the Municipal Commissioners of Howrah have deprived him by heaping stones thereon; and he alleges that the cause of action arose on the 15th June 1863, when his ryot, Madhusudan Daw, having been evicted by the Municipal Commissioners, gave up the land.

The Moonsiff fixed six issues to be tried in this case; of which we need take notice at present of only four, namely, whether the cause of action arose from the date of Madhusudan's relinquishment? whether the suit is barred by three months' limitation? whether the suit is barred by the general law of limitation? and whether the plea of *res-judicata* is applicable to the case?

The Moonsiff appears to have held that the plea of *res-judicata* applied to the case; and that, under the provisions of section 87, Act III of 1864 (B. C.), the suit was barred by limitation.

On appeal, the Subordinate Judge differed from the Moonsiff on both those points, and remanded the case to be tried on the remaining issues, namely,

whether the general law of limitation was applicable? and whether the disputed property appertained to the plaintiff's churland, and what was its correct measurement?

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A special appeal has been preferred against the order of the Subordinate Judge remanding the case, and two points have been urged before us: first, that the principle of *res-judicata* applies to the case; there having been a similar suit brought by one Poorno Chunder Roy, a 10-anna sharer in this property, against the Municipal Commissioners of Howrah, in which the present plaintiff, Khilat Chandra Ghose, was made a *pro forma* defendant. In that case the plaintiff's suit was dismissed; it having been found that the Municipal Commissioners had been in possession of this property for more than twelve years. Now, though the present plaintiff was made a defendant in that case, it cannot be said that any decision which was passed in that case between Poorno Chunder and the Municipal Commissioners is a decision which will be binding as between the present plaintiff and the Municipal Commissioners for any right which the present plaintiff may have with regard to this land. It appears to me, therefore, that the judgment of the lower Appellate Court was correct on this point.

The second point taken was limitation; and it is urged that, under the provisions of section 87, Act III of 1864 (B. C.), this suit should have been brought within three months from the date of the cause of action; and that as it has not been so brought, it is barred by limitation; and we are again referred to the case of *Poorno Chunder Roy v. Balfour* (1), as showing that the Judges who decided that case considered that the provisions of section 87, Act III of 1864 (B. C.), were applicable to a case of the present kind. It is very clear, looking at the judgment of Mr. Justice Bayley, that he first determined what were the rights of the parties; and having found that the Municipality had obtained a right by prescription, he considered that the plaintiff's case was barred by limitation; and he then added that he therefore considered that the provisions of section 87, Act III of 1864 (B. C.), were applicable. But Mr. Justice Phear, on the contrary, considered it very doubtful, and he was not prepared to say that section 87 applied to the case; but he agreed to the suit being dismissed, as proposed by his colleague. It is clear therefore that the special appellant can get very little assistance from that judgment. The fact is that it is necessary to look to the nature of the suit to see whether the provisions of section 87, Act III of 1864 (B. C.), are applicable or not. The present suit is a suit to recover possession on proof of the plaintiff's title, and would ordinarily be governed by the usual law of limitation, *viz.* twelve years from the date of the cause of action. But it is urged, on the part of the special appellant, that, where a Municipality is concerned, the ordinary law of limitation is set aside, and every action, of whatever nature it may be, against the Municipality, must, under the provisions of section 87, Act III of 1864 (B. C.), be brought within three months. It appears to me that that

(1) 9 W. R., 525.

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Act does not apply to cases of this nature; and that this section of that Act, to which particular reference has been made, relates rather to actions brought against acts of the Commissioners done under that particular Act for the purposes of that Act. For instance, in the present case, if, as was apparently the case, the stones had been stacked by the Commissioners under the provisions of the Act, a suit might have been brought within three months requiring them to remove these stones, or demanding damages for the stacking of them. A suit might be brought similarly for any other acts which the Commissioners might do under this Act. But this Act was never intended to take away from individuals the right which they have, under the general law of the land, of bringing suits to recover possession of immoveable properties, on proof of their title within twelve years. Previous to the passing of this Act, there was an Act (XXI of 1857) to make better provision for the order and good government of the suburbs of Calcutta and of the station of Howrah, and that Act contained no provision such as is contained in section 87. And it appears to me that the object of this section was to limit the time within which suits for damages,—and probably for damages alone, for which actions can be brought under this Act,—are to be brought. I think, therefore, that the judgment of the lower Appellate Court upon the second point also is correct, and that it was right in remanding the case to the lower Court for the disposal of the remaining issues.

We therefore dismiss the special appeal with costs.

Before Mr. Justice Phear and Justice Sir C. P. Hobhouse, Bart.

1870

June 2

MAHARAJA JAGADINDRA BANWARI GABIND BAHADUR
(DEFENDANT) v. BHABATARINI DAS (PLAINTIFF).*

Act VIII of 1859, s. 355—Evidence, Reception of, in Appellate Court, though not produced in Lower Court.

Baboos Jagadamanand Mookerjee and Rames Chandra Mitter for the appellant.

Baboos Annadaprasad Banerjee, Chandra Madhab Ghose, and Anand Chandra Ghosal for the respondent.

The judgment of the Court was delivered by

PEAR, J.—We think that the lower Appellate Court committed an irregularity in receiving, at the hearing on appeal, papers and documents which had not been produced before, without giving any better reason than the follow-

* Special Appeal, No. 178 of 1870, from a decree of the Subordinate Judge of Beerbhoom, dated the 10th November 1869.

ing :—“The papers alluded to above being material and important documents, the Court has accepted them.”

Under section 355 of the Procedure Code, the Appellate Court is forbidden to receive additional evidence, except when it is necessary to enable the Court to pronounce a satisfactory judgment, or, for any other substantial reason; and the latter part of the section obliges the Appellate Court whenever additional evidence is so admitted, to record its reasons for admitting it; also by an earlier section in the Code, section 128, it is enacted that no documentary evidence of any kind which the parties, or any of them are desirous to file, shall be received at a subsequent stage,—that is, after the first hearing—unless good cause be shown for their nonproduction earlier. Now, in the present case, it does not appear that any cause is shown for the non-production of the documents in question at an earlier stage of the proceedings, and we cannot hold the mere statement that the papers are material and important documents to be sufficient compliance with the provision of section 355, which requires the reason to be stated why the Appellate Court admitted the evidence.

The special appellant argues that this evidence, in consequence of being improperly received, is not evidence at all; and that, inasmuch as the judgment of the lower Appellate Court is, to a considerable extent, founded on it that judgment ought to be set aside.

We are not prepared to say that the improper reception of evidence in the manner I have mentioned necessarily has the effect of making the evidence not evidence at all between the parties. In this instance this evidence simply stands in the position of evidence which has been improperly admitted; and that being so, section 57 of the Evidence Act forbids us to reverse the decision of the lower Appellate Court, on the ground of the improper admission of the evidence, if it appears to us that, independently of this evidence, there was sufficient evidence to justify the decision.

* * * * *

We therefore dismiss this appeal with costs.

Before Mr. Justice Norman.

GANES SING AND OTHERS (PLAINTIFFS) v. RAMGOPALSING (DEFENDANT).

Suit for Declaration of Trusts of a Temple—Act XX of 1863.

1870
June 8.

In bringing a suit under Act XX of 1863, it is not necessary to show that the temple was one which was formerly under control of the Board of Revenue. The Act applies to property in Calcutta.

This was a suit under Act XX of 1863 for the declaration and enforcement of the trusts of a certain temple in Bara Bazar, Calcutta, and the religious establishments and endowments thereof.

The plaintiffs were professors of a certain religion which they alleged, was found many years ago by one Sri Sri Gurunanack Gurugabind Joi, and

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See also
15 B.L.R. 18.

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the temple had been built and established by Raja Hajurij Sing Mahashay and dedicated by him to Sri Sri Gurunanack Gurugabind Jio for the worship of the followers of the said religion.

The defendant had been acting as manager of the said temple; but the plaintiffs alleged that he had neglected the duties imposed on him as manager, refused to render accounts, and denied access to the plaintiffs to the said temple when they resorted there for the purpose of worship.

Leave of the Court to institute the suit had been obtained in accordance with section 18 of the Act on the trial.

Mr. Branson (Mr. Woodroffe with him) for the defendant raised the issue whether the plaint disclosed any cause of action. On this issue, he contended that suits under Act XX of 1863 could only be brought in respect of temples formerly under the control of the Board of Revenue. The Act itself is entitled, "An Act to enable the Government to divest itself of the management of religious endowments," and the preamble states that "the Act is enacted, because it is expedient to relieve the Boards of Revenue, &c., of the duties imposed on them by Regulation XIX of 1810 (1), "so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples, and for other religious uses; "the appropriation of endowments made for the maintenance of such religious establishments, &c." The Act does not apply to the present case, inasmuch as there is nothing to show that the temple has been under the control of the Board of Revenue. Suits are brought under the Act by section 14, and leave to institute the suit (section 18) applies only to suits in respect to temples to which the Act was intended to apply, of which the present temple is not one; and the person to be sued is the trustee or manager appointed under section 5. [NORMAN, "J.—The words "appointed "under this Act" in section 14 refer only to a committee appointed under the Act—see section 11; there is nothing to show that they refer to the words "trustee or manager." By section 5, provision is made for the appointment of a trustee or manager, and suits under the Act can only be brought against trustees or managers so appointed.

Mr. Kennedy (with him Mr. Macgregor and Mr. Apar) for the plaintiffs was not called on on this point.

NORMAN, J., was of opinion that the plaintiffs had clearly a right to bring the suit, under the provisions of the Act; and that they had properly instituted it.

(1) For the due appropriation of the rents repair of bridges, serais, kattas and produce of lands granted for the sup- ther public buildings; and for the cus- port of mosques Hindu temples, colleges, tody and disposal of nazul property or and other purposes; for the maintenance and escheats

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

KAILAS CHANDRA SANNEL AND OTHERS (DEFENDANT) v. DAWLAT SHEIKH AND OTHERS (PLAINTIFFS).*

1870
June 8.

Act XI of 1865, s. 21—Small Cause Court Act (Mofussil).

A defendant desiring a new trial of a case decreed against him in a Small Cause Court, must deposit in Court the amount of the decree passed against him and costs, at the time of giving notice of his intention to apply for the new trial. A subsequent deposit, though made within seven days from the date of decision, will not entitle the party to ask for a new trial.

Semble.—"The next sitting of the Court," mentioned in section 21, Act XI of 1865, refers to the next sitting after the decision complained of; and the words "within the period of seven days from the date of the decision" apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one Court.

THE following cases were submitted by the Judge of the Small Cause Court of Kishnagpur for the opinion of the High Court:—

"In these cases, which were contested ones, the plaintiffs obtained decrees. The defendants filed "notices" under section 21, Act XI of 1865, on the following day, but unaccompanied with the amounts decreed and costs as required by that section. Within seven days of the original decision, i. e., seven open days (see the case of *Girijabhusan Halder v. Akhay Nikari* (1)), applications for new trials were filed; and along with these applications, the amounts decreed and costs were deposited in each case. I have refused the

(1) *The 26th January 1870.*

*before Mr. Justice L. S. Jackson and
Mr. Justice Glover.*

GIRIJABHUSAN HALDAR (DEFENDANT) v. AKHAY NIKARI (PLAINTIFF).†

"In this case, which was a contested" one, a decree was given on the 6th of November. The 12th and 13th were holidays, the 14th was Sunday, and the 15th, a holiday. Notice of application for a new trial was filed on the 16th, or more than seven days from the date of the decision. The question which I have to submit for the opinion of the High Court is whether, under section 21, Act XI of 1865, the applicant can be allowed to deduct the four days on which the Court was closed in computing the seven days within which, according to that section, notice must be filed.

"I am of opinion that the authorized

holidays and Sunday cannot be excluded from the computation, at least, judging by analogy from what has been laid down in cases coming under the Limitation Act: *Raj Kristo Roy v. Dinobundoo Surmah* (2).

"A different rule however seems to have been laid down in appeals; and in *Shaxada Woolah Gowdur* (3), the Dussarah vacation was held to be "dies non" in a case coming under section 377 of the Civil Procedure, which does not however apply to Small Cause Courts.

"In this case the party applying for a new trial might have filed his notice on the 8th, 9th, 10th, or 11th which were open days, and have been within time according to section 21, Act XI of 1865."

The opinion of the High Court was delivered by

JACKSON, J.—The question in this case is whether, under the terms of the latter

* Reference No. 11 of 1870, from the Judge of the Small Cause Court at Kishnagpur dated the 5th May 1870.

† Reference, No. 20 B, from the Officiating Judge of the Small Cause Court of Kishnagpur, dated the 3rd December 1869.

(2) 3 W. R., C. Ref., 5.

(3) 6 W. R., 19.

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applications, on the ground that the amounts decreed and costs were not deposited along with the notices as required by section 21. The defendants urge that, as they are allowed seven days from the decision within which to file the notice along with which deposit is to be made, and as the latter was made within the seven days, though not along with the notices, the latter are notwithstanding valid. The question on which I have to solicit the opinion of the High Court is, whether a notice by a defendant, under section 21, Act XI of 1865, to apply for a new trial in a case which has not been decided *ex parte*, is valid, though unaccompanied by the deposit of the amount decreed and costs, if that amount has been deposited within seven days from the date of the decision. My own opinion is that such notice is not sufficient."

The opinion of the High Court was delivered by

L. S. JACKSON, J.—I am of opinion that a party, applying under the latter provision of section 21 of the Mofussil Small Cause Court Act for a new trial, must deposit in Court, with his notice of application, the amount for which a decree shall have been passed against him; and that where the notice has been given without such deposit, a subsequent deposit, though made within seven days, will not entitle the party to ask for a new trial. It appears to me that the Judge of the Small Cause Court at Kishnaghur, in making this reference, has, possibly, not considered the full effect of the words with which this proviso commences; they are "provided also that it shall be competent to the Court, if it shall think fit, in any case not falling within the proviso last aforesaid, to grant a new trial, if notice of the intention to apply for the same at the next sitting of the Court be given to the Court within the period of seven days from the date of the decision, and if the same be applied for at the next sitting of the Court."

I understand the words "the next sitting of the Court," not to mean the next sitting after the notice, but the next sitting after the decision complained of; and that the words "within the period of seven days from the date of the decision" apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one such Court; so that in case of the absence of the Judge himself after giving the decision, the notice, together with the deposit of the amount of the decree must be given to the Court within seven days, and the application must in all cases be made at the next sitting of the Court.

part of section 21, Act XI of 1865, notice of the application which the law requires to be given within seven days from the date of the decision is in time, when the seventh day and the following days are authorized holidays, but the notice is given on the first open day after such holidays.

It seems to me that the notice is in time. In this case the decision was given on the 6th November, and the seventh day thereafter would be the 13th, but the 12th, 13th, 14th, and 15th were authorized holidays, the 14th being Sunday. A notice of an application for a

new trial was filed on the 16th. The Judge observes that the party might have filed or given his notice on the 8th, 9th, 10th, or 11th. He might, no doubt, have done so, but he was not bound to do so, as the law allows him seven days for the purpose; and if on the last of those seven days, the Court was closed, that is not the fault of the applicant, and he seems to be entitled to give his notice on the first day thereafter on which he finds the Court open, and prepared to receive it.

GLOVER, J.—I am of the same opinion

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

BHUBAN MOHAN CHATTOPADHYA (JUDGMENT-DEBTOR) v SAUDAMINI DEBI, FOR SELF AND AS MOTHER AND GUARDIAN OF DEHARI LAL MUKHOPADHYA AND PYARI LAL MUKHOPADHYA, MINORS.
(DECREE-HOLDERS).*

1870
June 22.

Act XIV of 1859, s. 20—Proceedings to keep alive a Decree Bonâ fide Proceedings.

The question as to whether proceedings which had been taken to execute a decree had been taken *bonâ fide* to keep alive such decree, is a question of fact, and no special appeal lies from an order finding that the proceedings taken were taken *bonâ fide*.

THIS was an application made on 15th January 1870, to execute a decree passed on the 13th February 1865. It appeared that the decree had been partly executed in 1865. In 1868, another application was made for execution by the present applicant, as heir of the original decree-holder, and a notice was served on the judgment-debtor in September of that year. After two months it was discovered by the Amla that the applicant had not proved her right to represent the original decree-holder, and the case was removed from the file.

The Moonsiff held "that the decree-holder not having made in fact any arrangement subsequent to the 30th December 1865, up to the time of this petition, for keeping the decree in force, owing to lapse of time, the execution of the decree was barred;" and he rejected the application with costs.

On appeal, the Judge reversed the Moonsiff's order. He said:—"It is argued that the notice was not served *bonâ fide*, or with a real intention of executing the decree; but this proposition is not supported by the facts, and it appears to me that there was an intention to execute. It is also argued that the service of notice was invalid, because the application was made without proof of right to represent, but the Court was empowered to admit her to represent, and did admit her to represent, and therefore the proceeding was valid and sufficient. Moreover it appears that she had a right to represent, and the absence at that time of evidence adduced to prove the right cannot affect the right." The Judge sent the case back to the Lower Court for execution.

The decree-holder appealed to the High Court.

Baboo Purno Chandra Shome for the appellant.

Baboo Krishna Sakha Mookerjee for the respondent.

The judgment of the Court was delivered by.

JACKSON, J.—It appears to me that this special appeal is unfounded. The Judge has held that a proceeding had been taken by the plaintiff within three years next preceeding his application to execute, such proceeding having been taken *bonâ fide* with the intention of enforcing his decree. The contention before us is, that the proceeding referred to being in

* Miscellaneous Special Appeal, No. 151 of 1870, from an order of the Judge of 24-Pergunnas, dated the 2nd May 1870, reversing an order of the Munsiff of that district dated the 12th March 1870.

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BHUBAN
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complete and informal in its nature, was one on which the Court would not have been competent to act, and in fact, did not act; and that, on such a proceeding, the Judge was not at liberty to infer *bona fides* on the part of the Court plaintiff. It seems to me however, that the question of *bona fides*, as this Court has usually considered, is a question of fact for the consideration of the below. I think it would be impossible to say that, because an application to execute a decree had been defective in some particulars required by law to be contained in that application, or because the application was not accompanied by proof of the representative character of the applicant, the Judge would be bound, as a matter of law, to say that such a proceeding had not been taken *bona fide* with the intention of executing the decree. I think he is entitled to infer from the whole circumstances of the case, whether the plaintiff, in making that application, really had that intention or no. The Judge in this case has drawn the inference in favor of the plaintiff. I think we are not at liberty to disturb his conclusion. The special appeal must be dismissed with costs.

Before Sir Richard Couch Kt, Chief Justice, and Mr Justice Kemp.

1870
June 6.

P. T. ONRAET (JUDGMENT-DEBTOR) v. SANKAR DUTTSING AND OTHERS
(DECREE-HOLDERS).—

Decree, alteration of—Lower Court.

After a decree has been confirmed by the High Court on appeal, the subordinate Court has no power to make any alteration in it.

Mr. R. E. Twidale for the appellant.

Baboo Chandra Madhab Ghose and Lakhi Charan Bose for the respondents.

The Judgment of the Court was delivered by

COUCH, C. J.—In this case, the decree of the lower Court was modified by this Court, on a Regular Appeal, and the decree so modified has become the decree of the High Court. The alteration which has been made in it by the lower Court, is not an alteration to correct a clerical error, but is a material alteration in the decree by awarding interest on the amount of wasilat awarded. After the decree has come up on appeal and been confirmed by this Court, the lower Court has no power to make any alteration in it even to correct a clerical error. The proper course would be to apply to the High Court whose decree it has become; but I cannot consider this alteration as the correction of a mere clerical error; far from being so, it is a very important alteration in the decree. I held (and I continue of that opinion) in the case of *Bhaneeshankar Gopal Ram v. Rughonath Ram Mangal Ram* (1), that after a decree is confirmed by the High Court on appeal, the Subordinate Court has not the power of making any alteration whatever in it. We must reverse the order with costs.

* Miscellaneous Regular Appeal, No. 55 of 1870, from a decree of the Subordinate Judge of Bhawalpore, dated the 27th November 1869.

(1) 2 Bom. H. C. Rep., 106.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

LAKHI KANT DAS CHOWDHRY (PLAINTIFF) v. RAM DYAL DAS
AND OTHERS (DEFENDANTS).*

1870
June 24.

Limitation—Mesne Profits—Cause of Action.

The cause of action in respect to mesne profits accrues on the date on which, but for the fact of dispossession, the plaintiff would have been entitled to receive them.

THIS was a suit to recover mesne profits. It was instituted on 25th September 1867 (10th Aswin 1274.) The claim was for mesne profits from the commencement of 1263 (12th April 1861) down to 18th Aswin 1273 (3rd October 1866). The Courts below held that the plaintiff could not recover mesne profits for the time prior to 10th Aswin 1268 (26th September 1861), that being more than six years from the date of suit.

The plaintiff appealed to the High Court.

Baboo *Kalimohan Das* and *Kasi Nath Sen*, for the appellant, contended that the suit was not barred, and cited *Bisnoo Chunder Biswas v. Trotyuck-nath Banerjee* (1), *Maharaj Koer Bumpat Sing v. Furlong* (2), and *Dwarkanath Doss Biswas v. Manick Chunder Doss* (3).

Baboo *Bansidhar Sen* for the respondent.

JACKSON, J.—The plaintiff, special appellant, urges two grounds of special appeal, both of which appear to me to be valid. The first ground is, that the Court below has erroneously decided the question of limitation.

The suit was for wasilat. It was commenced on the 10th Aswin 1274 (25th September 1867), and the wasilat claimed was for a period of five years five months and eighteen days, commencing with the commencement of the year 1268 (12th April 1861).

The Judge, on appeal, has held, in concurrence with the opinion of the Court of first instance, that the suit in respect of wasilat for the five months and ten days was barred by limitation; and he conceives that the limit of wasilat, which the plaintiff is entitled to recover, would be from the 10th Aswin 1268 (26th September 1861).

In respect to a plaintiff who has been dispossessed from immoveable property to which he was entitled, the cause of action as to wasilat accrues, it appears to me, on the date on which the plaintiff, but for the fact of dispossession, would have received such wasilat, and when, consequently, it has been or might have been received by the defendant; and the plaintiff is entitled to recover, or any cause of action so accruing, at any time within six years next preceding the commencement of the suit, that is, in this case, on or after the date before mentioned in the year 1861 (1268). It would, of course, depend upon local custom what proportion of the yearly rent is paid at particular times; and if, therefore, on or after the 10th Aswin 1268 (26th September 1861), the rent of the whole year or any particular list of the rent would have been receivable, the plaintiff would have been entitled to recover accordingly.

* Special Appeal, No. 15 of 1870, from a decree of the Judge of Backergunge, dated the 22nd September 1869, affirming a decree of the Subordinate Judge of that district, dated the 13th April 1868.

(1) 6 W. R., Mis., 28.

(2) 3 W. R., 38,

(3) 9 W. R., 200.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
June 15.

BHUBAN CHANDRA SHOME (DEFENDANT) v. RAM DYAL SHAMANTA AND OTHERS (PLAINTIFFS).*

Special Appeal—Objection not taken in the Courts below

The High Court allowed objections to be taken by a defendant which had not been taken in either of the lower Courts.

Daboo Bhagabati Charan Bose and Ambika Charan Banerjee for the appellant.

Baboo Mahendra Lal Mitter for the respondents.

JACKSON, J.—It appears to me that the decision of the lower Appellate Court in this case cannot be supported with reference to the authorities on the point before us. The suit was for enhancement, and was tried before the Assistant Collector of Burdwan, who, after hearing the evidence on both sides and finding that evidence to be contradictory, ordered an enquiry by an Ameen; and, on the report of that Ameen, made a decree in favor of the plaintiff. The decree made did not confirm, precisely, the rates claimed by the plaintiff, but took, as it were, a middle course between the allegations of the plaintiff and those of the defendant. The Ameen reported that the land of the village in which the defendant's tenure was situated, was divided into four classes; and he found, not precisely in conformity with the whole of the evidence, but upon such part of the evidence as recommended itself to him that those four classes of land paid certain rates which he stated, and as the greater portion of the lands of the defendant was found to belong to the second of those classes, he reported that the defendant was liable to pay that rate on that quantity of land, and at that rate; accordingly, the decree was given.

The defendant upon this appealed to the Zilla Judge, and the ground that he seems to have taken before the Judge was that the evidence upon which his lands had been found to belong to the second quality or class, was not sufficient to support the finding of the Court below. The Judge, however, affirmed the judgment of the lower Court; and, upon review, only modified his own judgment and the judgment of the Court below, so far as to give the defendant a slight allowance in respect of certain lands alleged to have been taken for public purposes.

The defendant comes before us in special appeal and for the first time takes the ground that neither the notice nor the evidence given by the plaintiff

* Special Appeal No. 219 of 1870 from a decree of the Judge of East Burdwan dated the 25th August 1869, affirming the decree of the Assistant Collector of that district, dated, the 31st March 1869.

complied with the provisions of the law, under which enhancement was sought for. That provision was the first clause of section 17, Act X of 1859, which describes the ground of enhancement as being "that the rate of rent paid by such a riot is below the prevailing rate payable by the same class of riots for land of a similar description, and with similar advantages in the places adjacent." Now it is not disputed by the plaintiff, respondent before us, that the notice and the evidence fell greatly short of those requirements; and the only question upon which we have had a doubt is, whether the defendant ought to be allowed to prevail upon this ground taken for the first time in special appeal.

No doubt, if the objection referred only to the notice, we should have been inclined to hold that the defendant, by his silence upon this subject in the Court of first instance, as well as in the Court of Appeal, and by his going to trial contesting the case upon the evidence, had waived that objection. But nothing can get over the want of evidence; and with some reluctance I find myself compelled to follow the decisions which have been repeatedly given upon this point, namely, that a defect of this kind is fatal to a suit for enhancement.

But I think that, upon consideration, it is not unreasonable that such an objection should prevail. In the first place we must bear in mind that the suit brought by the plaintiff before us is one of the commonest kind, and that such suits probably form a very large proportion of the whole number of suits brought in Bengal. It is very little, indeed, to ask from a plaintiff who is seeking, as part of a system, to increase his receipts derivable from his tenants; that he should frame his suit, and also prove his case in exact conformity with the provisions of law which enable him to increase his profits; and, I think, there is no hardship at all, so far as he is concerned, in binding him to an exact observance of the law.

Then, as regards the Court, it appears to me that a Court administering a law like Act X of 1859 is bound to satisfy itself that the decrees it makes are exactly borne out by the provisions of the law.

If the conclusion of the Deputy Collector and of the Judge had been fully and completely stated in this case, it must have amounted to something like the following upon the evidence adduced by the plaintiff and by the defendant; and the word "evidence," of course, includes admission. "I find that the defendant, who holds a certain quantity of land of a particular description, is paying rent at a rate which is below the prevailing rate payable by the same class of riots for lands of a similar description, and possessing similar advantages in the places adjacent, and, consequently, by the first clause of section 17, Act X of 1859, he is liable to have his rent enhanced. I find that the measure of enhancement is so much, and consequently I give judgment for the plaintiff at so many rupees and so many annas." That stated fully, I think would be the conclusion at which the Court would have to arrive before it could give the plaintiff a decree in the present case.

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Now, is there any thing on the record which would justify the Collector's Court in giving such a decree to the plaintiff? It would appear there is nothing. It is said that the defendant did not dispute these points; but the system of our procedure in this country is not such that if a defendant fail to dispute or contest any point, he thereby admits it. On the contrary, if the defendant fails altogether to appear and allows judgment to go by default, the plaintiff is bound to prove his case just as much as if the defendant had appeared and denied the claim.

I think, therefore, we are bound to say that the judgment of both the Courts below in this case of enhancement are not in accordance with the law. At the same time it seems to me that the defendant has been extremely remiss in failing to take this ground of objection in any stage of the proceedings below, and therefore while I think we ought to reverse the decision of the Deputy Collector and of the Judge, and to order the dismissal of the plaintiff's suit, we ought to do so without making any order as to the costs of this appeal.

Glover, J.—I am of the same opinion.

Before Mr. Justice Glover and Mr. Justice Mitter.

RAGHUNATH SING (DEFENDANT) v. RAMKUMAR MANDAL
(PLAINTIFF).*

Act VIII of 1859, ss. 2, 110—Remand—Non-appearance of Parties.

When a suit has been remanded by the Appellate Court, and then dismissed by the Court of first instance for non-appearance of the parties, the plaintiff is not debarred thereby from bringing another suit upon the same cause of action against the same defendant.

Baboo Nubakrishna Mookerjee for appellant.

The judgment of the Court was delivered by

GLOVER J.—The point taken in this special appeal is that the suit is barred by section 2, Act VIII of 1859; it being one on a cause of action which had been previously heard and determined by a Civil Court.

It appears that, on a former occasion, the plaintiff sued the defendant and got a decree in the Court of first instance. On appeal, however, to the Judge, the case was remanded; and on the remand, no one having appeared, either for the plaintiff or the defendant, the suit was dismissed on default. This is the case which is relied upon by the special appellant's pleader as barring the plaintiff's suit.

Now it is quite clear, by section 110, Act VIII of 1859, that a case dismissed under these circumstances would allow of the plaintiff's bringing a
* Special Appeal, No. 847 of 1870 from a decree of the Second Subordinate Judge of Hooghly, dated the 18th November 1869, affirming a decree of the Moonsiff of that district, dated the 17th June 1869.

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July 21.

fresh suit, unless precluded by the rules for the limitation of actions, and it is not contended that the plaintiff is so precluded. Even if it be supposed, for the sake of argument, as the pleader for the special appellant has contended, that section 110 only refers to original cases, and not to cases remanded, still in no case could section 2 of the Act apply inasmuch as that section refers to causes of action which have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. In this case it is clear that there was no case determined at all. It was simply dismissed for default of appearance of the parties.

The special appeal is dismissed, but without costs, as nobody appears for the respondent.

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RAGHUNATH
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RAMKUMAR
MANDAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
July 20.

RAJBALLAB SAHA (DEBTOR) v. RAMSADAY GHOSE AND OTHERS
(DECREE-HOLDERS).*

Dismissal of Petition for non-appearance when no day had been fixed for hearing it—Act VIII of 1859, s. 217.

Baboo Rama Nath Bose for the appellant.

Mr. R. E. Twidale for the respondent.

JACKSON, J.—In this case application was made to execute a decree, and notice was issued under section 216 of the Code of Civil Procedure, to the party against whom execution was applied for, to show cause why the decree should not be executed. He came and presented by his pleader a petition containing certain grounds of objection, and on that petition the Judge made the order that it was to be placed before him with the record. It does not appear that any day was fixed for hearing the petition, but on a subsequent day the Judge states that case was called on, and was repeatedly placed before him, but the pleader did not attend, and therefore the objections were disallowed.

The judgment-debtor afterwards applied to the Judge to reconsider the order, and the Judge there expressly states that the objection had been disallowed in consequence of the absence of the pleader.

It appears by an order subsequently made in the petition of the decree holder that the arrest of the judgment-debtor has been ordered in execution.

By section 217 of the Code, it is provided that “when such notice is issued “if the party shall not attend in person or by a pleader, or shall not show “sufficient cause to the satisfaction of the Court why the decree should not “be forthwith executed, the Court shall order it to be executed accordingly.

*Miscellaneous Regular Appeal, No. 186 of 1870, from an order of the Judge of the 24-Pergunnas, dated the 2nd and 36th April 1870.

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RAMSADAY
GHOSH.

"If the party shall attend in person or by a pleader, and shall offer any objection to the enforcement of the decree, the Court shall pass such order as in the circumstances of the case may appear to be just and proper."

It seems that, in this case, the party had attended by pleader, and had offered objection, in the shape of a written petition, to the enforcement of the decree. The proper course would have been for the Judge to have fixed a day on which the petitioner was to be heard, but whether such day was fixed or not, and even if the petitioner was not present, still I think the Judge would be bound to consider the objection which he had filed and to pass, as required by the Act, such order as in the circumstance of the case appeared to be just and proper. It might be that the ground of objection raised in the petition would be of such a nature as that the Judge might *prima facie*, and without going further into the case, see reason for not proceeding with the execution.

I think the Judge's order must be set aside, and he must be desired to take into consideration the objection of the judgment-debtor; and pass such order as he thinks proper.

GLOVER, J.—I concur generally with Mr. Justice Jackson. I think the case should be remanded to the Judge to try the nature of the objection taken by the judgment-debtor. I also think that if a day had been fixed, and the party had not then appeared, the judge would have been justified in not going further into the case, but might have disposed of it at once.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
June 22.

HARIDAS NANDI (DEFENDANT) v. JADUNATH DUTT (PLAINTIFF) *

Right of Way—Easement—Limitation—Act XIV of 1859.

A right of way over the land of another must be kept up by constant use. After a discontinuance of such use for a period of six years, no suit can be brought to re-establish it.

Baboo Koma Kant Sein for the appellant.

Baboo Boikanto Nath Paul for the respondent.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—It appears to me that the decision of the lower Appellate Court in this case was erroneous, and that it is much to be lamented that the careful and well-considered decision of the Moonsiff was reversed.

The plaintiff, it seems, had purchased a dwelling house which formerly belonged to one Jaykisto Nandi, a relative of the defendant. Jaykisto Nandi having died, his widow sold the house, which appears to have remained

*Special Appeal, No. 294 of 1870, from a decree of the Judge of East Burdwan, dated the 11th December 1869, reversing a decree of the Moonsiff of that district, dated the 29th July 1869.

unoccupied for the space of six years. The plaintiff has now discovered that the defendant is building a privy which crosses a pathway leading to a tank, which had formerly been used by the female members of Jaykisto's family; and he brings his suit, asking for possession of the pathway, and for the pulling down of this construction erected by the defendant.

The Moonsiff took evidence and went to the spot, and he ascertained that the pathway in question lay over ground belonging to the defendant; that in the life-time of Jaykisto, and, after his death, in the time of his widow, the members of both families had been accustomed to use this pathway and a *khirkee*, or private door, communicating therewith; but that for some years since Jaykisto's widow had left the place, this pathway had not been used by any person residing in that house. He found that the land belonged to the defendant, and considering that by six years' non-user, the plaintiff had lost the right to claim that easement, he dismissed the suit so far as it related to the pathway, but he ordered the defendant to pull down the privy, on the ground that it was a nuisance, an inconvenience to the plaintiff, and likely to interfere with his occupation of his own purchased premises.

The plaintiff did not appeal from that part of the decision by which the land was found to be the property of the defendant, but he appealed on the ground that his non-user for six years did not deprive him of the right to the pathway. On that the Subordinate Judge states: "I think a portion of the "lower Court's decision is incorrect and erroneous, for the existence of a path-
"way in the place of the disputed pathway, the use whereof is contested, has
"been admitted by all parties as well as by the lower Court on personal
"observation by the lower Court. That only defendant and not plaintiff
"used this pathway, defendant has failed to satisfy the Court by any particu-
"lar evidence. Besides, I see no law providing that the non-user of a path-
"way for six years shall destroy the right to use it. And as regards the judg-
"ment of the lower Court holding the privy to have been unjustly made by
"defendant on that pathway, no appeal has been taken on this point."

Now that which the Moonsiff found was not that the previous occupants of the house purchased by the plaintiff had a right of way over the land in question, but that when that house was occupied by a family nearly related to that of the defendant, the members of both families were accustomed to go over that path. This it seems to me is far from implying the right of way claimed by the plaintiff: and in this point of view, the observation made by the defendant's vakeel is not altogether out of place, namely, that the widow of Jaykisto did not affect to convey to the plaintiff any such easement as this right of way in question. Presumably, I think, it was a license given to the family of Jaykisto by reason of their relationship to the defendant. But whether this be so or not, it seems to me that a right of the description claimed by the plaintiff,—namely, of passing freely over the land of the defendant is one which requires to be kept up by constant use, and if the plaintiff discontinues the use of such right, if there were any, for the space

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of six years, I think he is not in a position to maintain a suit to re-establish it.

I think, therefore, that the decision of the Moonsiff in this case was reasonable and right, and that the Subordinate Judge has reversed it on insufficient and invalid reasons. I think the decision of the lower Appellate Court must be set aside with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
July 23.

MAHES CHANDRA MOOKERJEE (PLAINTIFF) v RAMUTAM PALIT
AND OTHERS (DEFENDANTS).*

Highway—Criminal Procedure Code, (Act XXV of 1861) s. 320—Civil Court Jurisdiction.

The Magistrate had, on the complaint of the defendant, passed an order, under section 320 of the Criminal Procedure Code, forbidding the plaintiff to retain possession of a piece of land to the exclusion of the public, until he had obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff, accordingly, brought his suit in the Moonsiff's Court to recover possession, of the land. The Moonsiff gave him a decree for exclusive possession of the land. On appeal, the Judge held that the Moonsiff had no jurisdiction to try the question whether the public had a right of way over the land. The Judge's decision was reversed in special appeal, and the case remanded to the Judge to try the issue, whether the plaintiff was entitled to the exclusive use of the land. *Rooke v. Pyari Lall* (1) distinguished.

Baboo *Bhriraj Okandra Banerjee* and Mr. J. S. Rochfort for the appellant.

Baboo *Rash Behari Ghose* and *Debender Chandra Ghose* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—This suit is brought by the plaintiff against Ramutam Palit and others to recover possession of a small piece of land belonging to the lakhiraj homestead of the plaintiff.

It appears that the defendant had complained in the Magistrate's Court against this plaintiff in respect of the right of use of this piece of land; and the Magistrate having enquired into the matter, under the provisions of section 320 of the Code of Criminal Procedure, made an order forbidding the plaintiff to retain possession thereof to the exclusion of the public, until he should have obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff being dissatisfied with that order, brought his suit in the Moonsiff's Court. The Moonsiff took evidence and found that the land formed part of the plaintiff's homestead. He also found that a private path (over that

* Special Appeal, No. 539 of 1870, from a decree of the Additional Judge of Jessore, dated the 30th December 1869, reversing a decree of the Sudder Moonsiff of that district, dated the 14th August 1869.

(1) 3 B. L. R., App 43; S. C. on review, v. *Shama Charan Chatterjee* id A.C. 351. id. A. C., 305; see also *Hira Chand Banerjee*.

land, I suppose) had been used by the members of the family only, but he observed that "it could not therefore be admitted that it was a public road," he was therefore of opinion that the plaintiff was entitled to this land, but not to damages, and gave him a decree for possession of this land accordingly.

The defendant appealed to the Zilla Court, and the Additional Judge observed that the Moonsiff had based his decision upon a wrong ground. He says:—"I do not think it was competent for him to reverse a decision of the Faujdari Court on a point of fact which was not appealable to his Court. If plaintiff was dissatisfied with the Faujdari decision, and wished to test further the fact of the path being a private, and not a public one, he should have appealed to the proper Court; but if he laid his claim to close the path and take possession of the land, on the ground of his right to it as his private property, then he was right in applying to the Civil Court, but there also he must prove his right to close the road, whether it be public or private; and the Moonsiff should only have decided an issue, whether plaintiff had a right to close a path decided by competent authority to be a public path. He had I conceive, no power to re-open the question of publicity, and give it a second trial and investigation when it was a point decided by a Court, whose decision was not appealable, and not under appeal to him."

It is extremely difficult to follow the reasoning of this judgment, because in one place it points out that the plaintiff could have contested the Magistrate's decision by appeal to the proper Court, and, in another place states that the decision was not appealable.

In point of fact there is no appeal from a decision of the Magistrate under section 320 of the Code of Criminal Procedure, and the decision of the Additional Judge appears to have been passed without considering what the real nature of the Magistrate's decision was.

By the provisions of section 320, the Magistrate did not adjudicate upon the question of this being a public road, but he tried the issue whether it appeared, or did not, that the subject of dispute was open to the use of the public, and upon that he made the only order he was competent to make, namely, that the party claiming the exclusive use of it, should not retain exclusive possession, until he obtained the decision of a competent Court adjudging him to be entitled thereto. There was, therefore, no final adjudication by the Magistrate; and this law, as well as the Magistrate's decision, expressly reserved to this plaintiff the right of bringing the suit, in order to establish his right to exclusive possession. The Moonsiff does not in this case, I think, pretend to reverse or set aside the decision of the Magistrate. There was no occasion for him to do so.

The case is quite distinct from the case of *Rooke v. Pyarilal* (1) see the same case on review (2). There the decree of the Civil Court was of a very different character from that which the plaintiff applied for, or the Moonsiff has given, in this case.

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MAHES
CHANDRA
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(1) 3 B. L. R., App., 43.

(2) 3 B. L. R., A. C., 305.

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MAHES
CHANDRA
MOOKERJEE
v.
RAMUTAM
PALIT.

I think, therefore, that the decision of the Judge must be set aside, and the case must go back to him, in order that he may try that issue which arises, and which the Courts were bound to try in the case, namely, whether the plaintiff was, as he alleged, entitled to the exclusive use of this piece of land. If he was so, the plaintiff was entitled to a decree, the Magistrate's order notwithstanding.

Before Mr. Justice L. B. Jackson and Mr. Justice Glover.

IN THE MATTER OF CHANDI CHARAN CHATTERJEE v. CHANDRA KUMAR GHOSE AND ANOTHER.*

1870
July 23.

Criminal Procedure Code—Acts XXV of 1861 and VIII of 1869—Counsel—

Pleader—Prosecution.

A Counsel or Pleader is entitled to appear and act on behalf of the prosecution in the Criminal Courts.

THE Sessions Judge of the 24-Pergunnas referred the following case for the opinion of the High Court:

"In a criminal case, which has come before me in appeal, I find that the Deputy Magistrate has ruled that, in consequence of the repeal of Act XXXVIII of 1850, he cannot allow the complainant in a case before him to employ a pleader or a Mooktear to conduct the prosecution.

"The law which regulated the employment of agents in the prosecution of criminal cases was section 3, Regulation III of 1812; but that has also been repealed, and there is now no specific law on the subject. But I am not aware of any law or practice which is intended to deprive the complainant and the Court of the aid which may be given by the employment of a professional agent; and it appears clear to me that every facility ought to be given for the employment of such persons by the complainant as well as by the accused person. The employment of a pleader to conduct the prosecution would not of course excuse the presence of the complainant as a witness in support of his complaint, but it ought to assist the Court materially, and to ensure the production of all the evidence requisite for the due elucidation of the facts. Moreover, it is unjust to permit the employment of counsel on one side, and not on the other side; and in the case now before me, I might have felt that the refusal to allow the complainant's *vakool* to examine the witnesses would sufficiently explain the absence of evidence or other defects in the prosecution.

"It appears to me unnecessary to argue the point at any length. But as it has been raised, I have the honor to suggest that the High Court should issue a rule regulating the practice."

* Reference from the Sessions Judge of the 24-Pergunnas; by his letter No. 66 dated the 26th of May 1870.

The judgment of the Court was delivered by

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IN THE
MATTER OF
CHANDI
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CHATTERJEE
v.
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GHOSH.

JACKSON, J.—It seems to me quite clear that pleaders are empowered by Act XVIII of 1865 to appear, plead, and act in the criminal Courts, and they may so plead and act as well on behalf of prosecutors as on behalf of accused persons.

Section 419 of the Code of Criminal Procedure expressly recognised the right of the counsel or agent of the complainant to be heard upon appeal. We can see no reason for supposing that the right varies in the case of appeals from what it is in the case of proceedings in the Court of the Magistrate. Section 432, Act VIII of 1869, in my opinion, is merely intended to limit the right of an accused to be defended by a barrister or attorney of the High Court, or pleader, or otherwise by other persons with the leave of the Court.

We think, therefore, that the order of the Deputy Magistrate ruling that a pleader was not entitled to appear on behalf of a private prosecutor is erroneous, and ought to be set aside (1).

Before Mr. Justice Lock and Mr. Justice Mitter.

KANAI PRASAD BOSE AND ANOTHER (PLAINTIFFS) v. HIRACHAND MANU (ONE OF THE DEFENDANTS).*

1870
July 12.

Execution—Attachment and Sale of Moveable Property—Decree-holder, Liability of, to Owner of Property wrongly seized and sold by him.

In execution of a decree against a judgment-debtor, his right, title, and interest in an elephant was sold. In a suit by a third party against the decree-holder and the purchaser for recovery of the elephant or its value, on the ground that the elephant was his property, and not the property of the judgment-debtor.

Held, that the decree-holder, as well as the purchaser, was liable to make good the loss caused by such sale.

THIS was a suit for recovery of an elephant valued at rupees 1,500. The plaintiffs, had purchased the indigo concern at Kishoreganj, which formerly belonged to Messrs. Perroux and Company, partly by private sale, and partly at auction, and they accordingly had come to possession thereof along with the elephant in dispute, which appertained to the concern. The defendant, Hirachand, who held a decree against Messrs. Perroux and Company subsequently caused the elephant in dispute to be seized and sold in execution thereof. Hence the present suit to recover the said elephant or its value.

Hirachand's defence was that the elephant belonged to Messrs. Perroux and Company, and did not pass with the indigo concern to the plaintiffs.

(1) See also 4th XXV of 1861, sec. 376— question put to him by the Court, the prosecutor or the Counsel or Agent for the accused person, or if he answers any prosecution shall be entitled to a reply."

* Special Appeal, No. 526 of 1870, from a decree of the Judge of Rungpore, dated the 18th December 1869, modifying a decree of the Subordinate Judge of that district, dated the 4th December 1868.

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The defendant, Beharilal, who had purchased the elephant at the auction sale, set up that the sale had become valid, as he had paid for, and received delivery of, the property.

The Subordinate Judge found that the plaintiffs were the owners of the elephant in dispute, and citing *Mohanund Holder v. Akial Mehaldar* (1), held that they were entitled to recover the value thereof from the decree-holder and the purchaser.

On appeal, the Judge found that there was no charge of fraud against Hirachand, the decree-holder; that the purchase had been made by the plaintiffs' servant, who afterwards sold the elephant to the plaintiffs' father; and that there was no evidence to shew that the plaintiffs had sustained any loss. He accordingly reversed the decree of the lower Court, and dismissed the suit as against the defendant Hirachand.

The plaintiffs appealed to the High Court.

Baboo *Girishchandra Ghose*, for the appellants, contended that, irrespective of any question of fraud, there was a trespass committed by the defendant on the property of the plaintiff whereby he had sustained a loss. The defendant is bound to make good any damage which results from his acts — *Mussamat Subjan Bibi v. Sheikh Sariatulla* (2) was in point.

Baboo *Ramchandra Mitter* (Baboo *Anukulchandra Mookerjee* with him), for the respondent, contended that the decree-holder was not liable for damages on account of the sale of the elephant. He had sold nothing belonging to the plaintiffs. All that he had sold was the right, title, and interest of his debtor in the elephant. *Vide* section 249 of the Civil Procedure Code, and the case of *Mohanund Holder v. Akial Mehaldar* (1). Section 252, Act VIII of 1859, indeed says that the sale of immoveable property after delivery of the price thereof should be held absolute. But if the sale did not, under section 249 of the Procedure Code, extend beyond the right, title, and interest of the debtor nothing more could be held to have passed absolutely. The decree holder thus was not to blame for any inconvenience that the plaintiffs might have suffered by any act over which he could have no control. There was no allegation of fraud or *mala fides*. He sold his debtor's property — the right, title, and interest of his debtor in the elephant, for the liquidation of his debt. Under these considerations the decree-holder ought not to be held liable. The purchaser was liable for the damages on account of the value of the elephant. The purchaser ought to have enquired before purchase what the right, title, and interest of the debtor was in the elephant, and ought to have taken possession of the property, or dealt with it, according to the nature of that title. Thus, if he found that the elephant was to be in the possession of a third party, and that the judgment-debtor could use it only for four days in a month, the

(1) 9 W. R., 118.

(2) 3 B. L. R., A. C., 413.

purchaser should not have taken into his possession the elephant, though he might use it for four days in a month. In this case the purchaser purchasing only the right of the judgment-debtor, took possession of the elephant on his own risk. For this wrongful conversion of the property, he has been justly held liable. The decision in *Tamizuddin Mulla v. Nyantulla Sirkar* (1) was in point. The purchaser, and not the decree-holder, was held liable for damages.

Baboo Girishchandra Ghose in reply.

The judgment of the Court was delivered by

MITTER, J.—The only question raised in this special appeal is whether a

(1) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

TAMIZUDDIN MULLA v. NYANTULLA SIRKAR.*

May 22nd, 1869.

THE following case was referred by the Officiating Judge of Krishnaghur.

"The defendant, in execution of a decree against A., seized certain moveable property which was claimed, under section 245 of the Code of Civil Procedure, by B. An investigation was held under that section, and it was found that B. was part owner of the property. His claim was rejected and the sale proceeded, the moveable property sold being made over manually to the auction-purchaser, and the whole of the proceeds handed to the defendant (the judgment-creditor) in liquidation of his decree. The sale proclamation declared that the sale extended only to the right, title, and interest of the debtor, but there was no mention made of B.'s claim. The latter now brings a regular suit for damages against the defendant for the loss sustained by the sale of the property of which he was a joint owner. The question, and which I solicit the opinion of the High Court, is whether the defendant is liable, or should the suit be brought against the auction purchaser?" The Judge referred to *Mierres Begum v. Punnoo Singh* (2), and continued, "I am unable to find any ruling in point, but am of opinion that the

remedy lies against the auction-purchaser, firstly, according to the term of the Circular Order of the Sudder Court dated June 10th, 1842, and secondly, because the purchaser is informed by the terms of the sale proclamation that the sale extends only to the right, title, and interest of the debtor, and he ought, therefore, to take pains to inform himself before hand of the validity thereof. I think the maxim *caveat emptor* would be entirely applicable to such a case. The Circular Order of June 10th, 1842, directs that where a claim has been made, notice of such claim should be given to the public at the time of sale. Owing to an oversight, no such notice was given in the present case; but I think the notification that the sale extended only to the title of the judgment-debtor sufficient to put a purchaser on his guard. I have dismissed this case against the defendant contingent on the opinion of the High Court.

PEACOCK, C. J.—The Judge should not state an A. B. case, he should give the names. The Judge was right in holding that the execution-creditor was not liable. The purchaser would become entitled to an undivided share of the chattel, to be used by him as the owner of an undivided share. He would have the same right as the judgment-debtor and would not be liable to the owner of the other undivided share merely for using it, nor unless he converted it to his own use.

* Reference by the Officiating Judge of the Small Cause Court at Krishnaghur, dated March 2nd, 1869.

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decree-holder who has caused the sale of moveable property, not belonging to his debtor, is liable to make good the value of that property to its rightful owner, supposing that he (the decree-holder) has acted in perfect good faith.

I am of opinion that this question ought to be answered in the affirmative.

Whether the decree-holder has acted in good faith or not, does not seem to me to be of much importance one way or the other. It is beyond all question that a decree-holder has no right to seize a property which does not belong to his debtor, and he is therefore bound to satisfy himself beyond the possibility of a mistake that the property against which he intends to execute his decree is really the property of his debtor. No mistake on this point, however innocently committed, can relieve him from the consequences of his own act, which is certainly an act of trespass so far as the rightful owner is concerned, and I see no reason in justice or equity why the latter should suffer in consequence of such a mistake. It has been said that the rightful owner may follow the property in the hands of the purchaser who purchased it at his own risk and peril. But there is no law that I am aware of which says that this is the only remedy of the rightful owner. Suppose, for instance, that the purchaser is an insolvent, or that he is beyond the reach of the Court's process, or that the rightful owner is unable to find him out. Is the rightful owner to pocket the loss, because the decree-holder has acted under a mistake? I see no reason whatever for acceding to such a contention.

Much stress has been laid by the pleader for the respondent upon two decisions of this Court: the one in *Mohanund Holdar v. Akial Mehaladar* (1); the other in *Tamiruddin Mulla v. Nyanutulla Sirkar* (2). But neither of these two cases appears to me to have any bearing upon the point now under our consideration. All that was decided in the first case was that the owner of moveable property sold in execution of a decree, is at liberty to follow that property in the hands of the purchaser; but no question relating to the liability of the decree-holder seems to have been raised or discussed before the learned Judges by whom that decision was passed. In the second case, it was found, as a fact, that the judgment-debtor had a moiety or half share in the property seized by the decree-holder; so that, if anybody was to blame, it was the auction-purchaser who had taken possession of the entire property, notwithstanding that he was entitled to one-half of it only as the purchaser of the right, title, and interest of the judgment-debtor. There is one case, however, *Mussumut Subjan Bibi v. Sheikh Sariatulla* (3), which directly supports my view.

For the above reasons, I would reverse the decision of the Judge, and restore that of the Court of first instance. The costs of this Court and of the lower Appellate Court ought to be borne by the decree-holder, respondent.

(1) 9 W. R., 118.

(2) *Ante*, p. 73.

(3) 3 B. L. R., A. C., 413.

Before Mr. Justice Bayley and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF SHEIKH ILAHI BAX AND OTHERS
(PETITIONERS).*

1870
June 7.

Appeal—Act VIII of 1859, ss. 324., 325—Award.

Two, out of three arbitrators appointed in the case, submitted their award before the Moonsiff. The defendant against whom the award had been made applied to the Moonsiff to set aside the award, on the grounds of corruption and misconduct, and that the award was a nullity, inasmuch as only two out of three arbitrators had made the award. The Moonsiff overruled the objections and passed a decree in terms of the award. On appeal to the Judge, the order of the Moonsiff was set aside, on the ground that the award, was illegal, as two only of the three arbitrators originally appointed had made the award, and that the evidence did not prove the plaintiff's case.

On an application to the High Court to set aside the order of the Judge, *held*, that under section 325, Act VIII of 1859, the Judge had no jurisdiction to set aside the award when the Court of first instance had passed judgment according to the award.

SHEIKH ILAHI BAX and others petitioned the High Court as follows:—

“That your petitioners instituted a suit in the Court of the Moonsiff of Amdohora, in the district of Beerbhoom, for recovery of a certain quantity of paddy, or damages in equivalent thereof, against Sheikh Hafu and Sheikh Sumid, defendants.

“That, after some evidence had been gone into on the part of your petitioners, the matter in difference between the parties was referred to the arbitration of three individuals, named Umesh Chandra Chatterjee, Shibu Prasad Acharji, and Shastidhur Mandal, upon an agreement signed by both the parties. The material portion of the agreement is:—‘Of the three arbitrators, the decision of the majority shall be binding; if any arbitrator shall
“ ‘refuse or be incapable to act, then the decision come to by the other
“ ‘arbitrators, with the aid of any umpire they may appoint with the concurrence of both the parties, shall be equally binding; and if there be any
“ ‘difference of opinion between the two arbitrators, then the award of the arbitrator who is supported by the umpire shall prevail and be binding.’

“That the three arbitrators aforesaid repaired to the *locale* and examined three witnesses in the presence of both the parties. The arbitrator, Shastidhur Mandal, never again appeared to make the investigation referred to. The other arbitrators made a reference to the Court, on account of the absence of the said Shastidhur Mandal; and, under the orders of the Court, caused notices to be served on the said Shastidhur Mandal, and the parties to the suit for their appearance.

* Rule Nisi or Motion, No. 406 of 1870, from an order of the Judge of Beerbhoom, dated the 10th March 1870.

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ance. Shastidhur did not appear; but on the appearance of the parties they were told by the two arbitrators to produce their witnesses on a certain day. The plaintiffs appeared on the fixed day with their witnesses, but the defendants or their witnesses did not appear. Upon this the two arbitrators made a reference to the Court to know whether they should proceed with the case under the circumstances, and the Court ordered them to proceed with the case; and if the defendants did not appear, to make their award on *ex parte* investigation; the defendants at the same time applied to the Court to supersede the arbitration, and recall the suit, on the ground of corruption and misconduct of the arbitrators, but their application was rejected. The two arbitrators then investigated the case *ex parte*, and submitted an award, which was partially favorable to the plaintiffs.

"That, upon the submission of this award, the defendants put in a petition to the Court, praying that the award be set aside, on the ground of corruption and misconduct of the arbitrators, and of one of the arbitrators having been absent; the Court took evidence on the part of the defendants to consider the charge of corruption and misconduct, and then finding the charge unsubstantiated, gave its judgment according to the award.

"That the defendants appealed against this judgment of the Moonsiff to the Judge of the district, and the Judge held that the award was illegal, as two out of the three arbitrators originally appointed only made the award; and upon a consideration of the plaintiffs' evidence in the record, found plaintiffs claim, as laid in the plaint, not satisfactorily proved; and he therefore reversed the judgment of the Moonsiff by a judgment dated the 10th March 1870."

And the petitioners submitted—

"1. That the Judge had no jurisdiction to entertain the appeals as, under section 325 of Act VIII of 1859, the judgment of the Moonsiff was final.

"2. Assuming that the Judge had jurisdiction in the matter, he could not set aside the award, as it was not, in fact, made without jurisdiction, and he had no jurisdiction to decide the merits of the case upon the evidence in the record, and reverse the judgment of the Moonsiff."

A rule *nisi* was thereupon issued calling upon the defendants to shew cause, within fifteen days of service, why the order of the Judge of Beerbhoom, dated the 10th March 1870, should not be set aside, and the judgment of the Moonsiff restored.

Baboo Mohini Mohan Roy shewed cause and contended that there was no award, as only two out of the three arbitrators had attended and made the return, and therefore the Moonsiff's judgment was not a judgment according to the award within the meaning of section 325, Act VIII of 1859. He cited *Sreenath Ghose v. Rajchunder Paul* (1).

Baboo Debender Chandra Ghose, in support of the rule, cited *Pareshnath Day v. Nabin Chandra Dutt* (1).

(1) *Before Mr. Justice Glover and Mr. Justice Mitter.*

PARESHNATH DEY AND ANOTHER
(DEPENDANTS) v. NABIN CHANDRA
DUTT (RESPONDENT).*

June 28th, 1869.

MITTER, J.—We are of opinion that the decision of the lower Appellate Court ought to be reversed. The Moonsiff who tried this suit in the first instance, referred it to arbitration, under the provisions of section 315, Act VIII of 1859. The arbitrators came to the conclusion that the transaction relied upon by the plaintiff was altogether fictitious, but they nevertheless held that the plaintiff was entitled to a decree, inasmuch as the defendant had affixed his signature to the *bina-patra* upon which the suit was brought.

The Moonsiff declined to uphold this award, upon the ground that the arbitrators were guilty of misconduct, in deciding contrary to the evidence which they themselves had accepted and believed.

On appeal, the Judge has reversed the Moonsiff's decision, holding that the Moonsiff had no jurisdiction to refer to the evidence taken by the arbitrators for the purpose of determining whether they were guilty of misconduct or not.

It has been contended before us that the Judge having disposed of the case according to the award of the arbitrators, the decision is final, under the provisions of section 325 of the Code. But we are clearly of opinion that this contention is not sound. The provisions of section 325 apply to that Court only, by which the case is referred to arbitration, and to no other Court. In the present case, the Court which made the reference declined to pass judgment according to the award; and the Judge, having on appeal, reversed the decision of that Court, we have every power to see whether the Judge's decision is correct or otherwise. There is nothing in the provision of section

325 which goes to show that those provisions were intended by the Legislature to be applicable to a case like the present, and we are bound to entertain this special appeal; there being no express provision to the contrary.

Upon the merits, we are of opinion that the Judge's decision is wrong. The Moonsiff had every power to refer to the whole of the arbitration record, for the purpose of determining whether the arbitrators were guilty of misconduct or not. Section 320 says:—"When an award in a suit shall be made either by the arbitrator or arbitrators, or by the umpire, it shall be submitted to the Court under the signature of the person or persons by whom it is made together with all the proceedings, depositions, and exhibits in the suit." If, therefore, the arbitrators are bound to submit to the Court, all the proceedings, depositions, and exhibits in the suit, the Court to which they are submitted has every power to look into them; and if on the perusal of those proceedings, depositions, and exhibits, the Court is satisfied that the award is of such a perverse character as to raise a reasonable presumption of misconduct on the part of the arbitrators, it has every power to set it aside.

Charges like partiality and misconduct, are seldom capable of direct proof; and if the proceedings of the arbitrators which contain the best available evidence of their conduct are not referred to for the purpose of determining whether that conduct was good or bad, gross failure of justice might ensue in many cases. In the present case, there can be no doubt that the award of the arbitrators is highly improper on the very face of it, and the Moonsiff was fully justified in holding them guilty of misconduct, in having decided the case contrary to all the evidence which they had themselves recorded and believed.

We reverse the decision of the Judge, and restore that of the Moonsiff, with the costs of this Court and of the lower Appellate Court.

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* Special Appeal, No. 3217 of 1868 from a decision of the Officiating Additional Judge of Jessore, dated the 3rd September 1868.

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BAX.

The judgment of the Court was delivered by

MARKBY, J.—I think this rule must be made absolute. There was a suit before the Moonsiff. That suit was referred to arbitration. Pending the arbitration, a dispute arose as to whether or not the arbitrators could proceed. An application was made to the Court, and the Moonsiff expressed an opinion that the arbitration could proceed. Thereupon two of the arbitrators proceeded to make the award, and the Moonsiff gave a judgment in accordance with that award.

Against that decision the defendant appealed to the Judge. The Judge was of opinion that the award was invalid; and upon a consideration of the evidence on the record, he found that the plaintiff's claim was not satisfactorily proved, and therefore reversed the judgment of the Moonsiff and dismissed the plaintiff's suit.

We think that the order of the Judge was made without jurisdiction, and ought to be set aside. The function of the Court, in arbitration cases, in dealing with an award, is laid down in sections 324 and 325, Act VIII of 1859. Under section 324, an award can only be set aside on two grounds, viz., on the ground of corruption and on ground of misconduct on the part of the arbitrators. Under section 325, the Court, if no application to set aside the award on the grounds above stated be made, or if any application be made but refused, shall proceed to pass judgment according to the award; and in every case in which judgment shall be given according to the award, the judgment shall be final. No provision is therefore made for a case in which the award is absolutely void, and whether or no it is convenient that that should be the state of the law, it is quite clear that the remedy is not, and cannot be, by an appeal to the Judge (1). Of course, we do not in the least mean to intimate any opinion whether this award was a good or a bad award, or whether it can be enforced; that question is not before us. All that we do mean to say is that, when a judgment was passed by the Moonsiff in accordance with it, that judgment was not subject to any further appeal to the Judge. We think that this opinion of ours is in accordance with the view of law taken in *Sreenath Ghose v. Rajchunder Paul* (2); and although it is true that it appears at first sight somewhat in conflict with the view taken in *Paresnath Dey v. Nabin Chandra Dutt* (3), I doubt if it is really so.

This last case was one of a very peculiar character. reference to arbitration did not take place until after a remand from this Court; and looking to the order of reference, I doubt very much whether the record ever really left the Court. I am inclined to think that only the question on remand was referred to the arbitrators. At any rate it is obvious that the course taken by the Judge in this case is erroneous. There was no judgment

(1) See Sec. 323, Act VIII of 1859.

(3) *Ante*, p. 77.

(2) 8 W. R., 171.

according to the argument of the very party who appears to show cause, upon which an appeal could lie. The only contention is that the proceeding under the arbitration was void, and there was no judgment by the Moonsiff of his own, but only a decree according to the award. Upon this fact alone, however, it seems clear to us that no appeal could lie, because there was no judgment to appeal against.

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We think, therefore, that the Judge acted without jurisdiction in this case, and that his judgment must be set aside, and this rule made absolute with costs.

Before Mr. Justice Markby.

1870
August 9.

DUTT v. CORNELIUS.

Subsistence-money—Discharge—Act VIII of 1859, ss. 276, 278.

A prisoner was arrested on August 4th, and committed to prison on the evening of the same day. Before his committal, the execution-creditor paid into the hands of the jailor a sum sufficient for his subsistence-money for 27 days, at the established rate of 4 annas per day. On the 5th August, a writ of *habeas corpus* was applied for to bring the prisoner up, and on the 6th, a further sum of 4 annas was paid to the jailor to cover any deficiency in the former payment.

Held, that the requirements of section 276, Act VIII of 1859, had not been fulfilled, and that the prisoner was entitled to his discharge under section 278.

THIS was an application for discharge of the defendant from custody, on the ground that his subsistence-money had not been paid in accordance with section 276 of Act VIII of 1859. The defendant was brought up in obedience to a writ of *habeas corpus* which had been issued to the jailor.

Mr. Kennedy for the prisoner.

Mr. Bonnerjee for the execution-creditor.

MARKBY, J.—I think the applicant is entitled to his discharge. He was arrested on the 4th August, and committed to prison on the evening of that day. Before the committal, the plaintiff paid into the hands of the proper officer the sum of rupees 6-12, which, at the rate established of 4 annas a day, would be his subsistence-money for 27 days. Now the first question that arises is whether that was a compliance with section 276 of Act VIII of 1859. What strictly remained unexpired was 27 days and 6 or 7 hours, and I do not think that the payment for 27 days only is a compliance with what the section requires. Then, it appears that, on the 5th August, application was made for a *habeas corpus* to bring up the body of the prisoner, and on the following day, the sum of 4 annas was paid to the jailor to supply any deficiency in the previous payment. It has been contended that inasmuch as there always was in the hands of the jailor money sufficient for the maintenance of the prisoner, and the deficiency of payment before the com-

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mittal was immediately supplied, the prisoner ought not be released. I do not think that this has been decided by the cases of *Speyer v. Janssen* (1) *In re Konoyloll Doss* (2), and *Aga Ali Khan v. Joydoyal Persaud* (3), to which reference has been made; but there are expressions in those cases which show how Mr. Justice Phear would have decided it if it had come before him. He says generally, and I concur with him, that section 276 must be construed strictly, and we are not to consider whether the prisoner suffered; and I am bound to hold the creditor to section 278 of the Act, and to say that the defendant should be released on the detaining creditor omitting to pay the allowance as above directed,—that is, as directed by section 276. I have already held that the creditor did not pay as directed, and I find nothing to authorize me to say that the payment on a subsequent date would be sufficient. As to whether the original arrest was illegal, I do not think the question is before the Court, and I refrain from expressing any opinion upon it.

Before Mr Justice Markby.

HALADHAR DEY v. AMBIKA CHARAN BOSE.

1870
November 8.

Subsistence-money—Discharge—Act VIII of 1859, ss. 276, 278.

On the 30th of September, the plaintiff, a detaining creditor, paid to the jailor of the Calcutta Jail subsistence-money for 30 days, for a prisoner confined at the suit of the plaintiff, the jailor then having a balance of 4 annas over from the subsistence-money for September.

Held, a sufficient compliance with section 276 of Act VIII of 1859.

THIS was an application for a rule *nisi* calling on the plaintiff to show cause why the defendant, a prisoner in the Calcutta Jail, should not be discharged from custody. The defendant was confined in execution of a decree obtained against him by the plaintiff in the above suit.

It appeared that the prisoner's subsistence-money had been paid up to the end of September; on the 30th of which month, the jailor had a balance of 4 annas in favor of the detaining creditor, the plaintiff. On that day a further sum of rupees 7-8, being subsistence-money for 30 days at the rate of 4 annas a day, was handed over to the jailor as the diet-money for October.

Mr. Hyde, in support of the application, contended that, as the provisions of section 276, Act VIII of 1859, had not been complied with by the plaintiff, the defendant was entitled to his discharge under section 278. By section 276, "sufficient" subsistence-money must be supplied "by monthly payments, in advance, before the first day of each month." Here subsistence money for only 30 days had been paid instead of 31. The balance of 4 annas from the September payment could not be treated as part of the October payment,

(1) Bourke's Rep., 28.

(3) Bourke's Rep., 52.

(2) *Id.*, 51.

without some arrangement with the jailor to transfer it to that account, which had not been made. The prisoner was therefore entitled to his discharge.

MARKEY, J.—No doubt the section ought to be construed strictly, but I am of opinion that this application should be refused. Section 276 of Act VIII of 1869 says that sufficient subsistence-money must be paid to the jailor before the commencement of the month for which it is paid. The plaintiff in this case had paid sufficient money for the month of October into the hands of the jailor prior to the commencement of that month. It is in fact admitted that the jailor had, on the 30th September, sufficient money for the month of October. This being so, I do not think the prisoner is entitled to his discharge.

Attorneys for the prisoner : Messrs. Ghose and Bose.

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Before Mr. Justice Loch and Mr. Justice Glover.

THE QUEEN v. RAI LAHMIPAT SING.*

Code of Criminal Procedure (Act XXV of 1861), s. 62—Prohibitory Order.

1870
July 9.

Under section 62 of the Code of Criminal Procedure, a Magistrate cannot pass a Prohibitory order, without having previously issued a rule to show cause why the order should not be passed.

This case was submitted, for the opinion of the High Court, by the Sessions Judge of Rungpore.

In the district of Pogra, a dispute arose between two zemindars, about two neighbouring *hats*. A serious breach of the peace occurred, and a Deputy Magistrate investigated the case on the spot. The Magistrate of the district afterwards took up the matter, and bound down certain of the parties under recognizances to keep the peace. On the same day, without giving the parties any formal notice, or any opportunity of showing cause against the order, he passed an order, under section 62, directing that the market-day in one *hat* should be changed.

The Magistrate's order was :—"I direct, under section 62, Criminal Procedure Code, that a written order be served upon the defendants prohibiting them from holding the *hat* at Muradpur on Mondays and Thursdays."

In support of his opinion, that the Magistrate's order was illegal, the Sessions

* Reference, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore, in his letter No. 361, dated 17th June 1870.

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Judge cited *The Queen v. Kalika Prasad* (1), *In the matter of Hari Mohan Malo* (2), *The Queen v. Bhgyo Dayal Singh and others* (3), and *In the matter of the petition of Kalidas Bhuttacharjee* (4).

(1) *Before Mr. Justice L. S. Jackson and Mr. Justice Markby*

THE QUEEN v. KALIKA PRASAD

26th January 1869.

JACKSON, J.—It seems to me that we are not called upon to set aside the order of the Magistrate as being contrary to law. I think that the order made in this case was strictly with the provisions of section 64 of the Code of Criminal Procedure. The terms of this section have been made—and apparently intentionally made—extremely wide. They enable the Magistrate to direct any person to abstain from any act or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider such direction is likely to prevent obstruction, annoyance or injury, or risk of obstruction, to any person lawfully employed, or is likely to prevent a riot or an affray. The Magistrate considered in this case (whether rightly or wrongly, we are not called upon to say) that the continuance of these two *hats* held on the same day, upon adjacent pieces of ground, was certain to lead, as it had already led, to riots and affrays, and also to annoyance or injury to persons lawfully employed; and that, by directing the parties to abstain from holding the *hats* on the same day, he was likely to prevent those injurious results. It appears to me that it is precisely such a case as is contemplated by the section. Several cases have been cited to us, in which it is contended that the Judges have held an opposite opinion. The only case however precisely bearing on the present point is the case of *Sheeb Chunder Bhattacharjee v. Saadut Ally Khan* (a). We have not got the facts of that case before us; but so far as we can judge, the case was not precisely, on all fours, with the present. Mr. Justice Trevor observes:—"I am clearly of opinion that these words do not authorize a Magistrate to interfere with the exercise of any of his ordinary rights by a landholder, merely, because such exercise may require vigilance on the part of the Police, and may, in the absence of such vigilance, lead to an affray."

I suppose that the words used here are the words which the Magistrate employed in drawing up his order. It may very well be that the circumstances did not justify the order made on that particular occasion. As the present case is presented before us, it appears to me that the order is strictly within the Magistrate's competence.

MARKBY, J.—I am of the same opinion. Of course, no one would doubt that, in cases of this kind, a Magistrate ought to be most careful that he does not do more than is absolutely necessary, in order to preserve the peace, or to prevent the nuisance which is brought before him; but if it has been, as it was in this case, made out that, by the exercise of the strict legal rights of the parties, a breach of the peace has several times occurred, and the Magistrate is of opinion that, by the continuance of the parties to exercise those rights, further breaches will occur, I think he is perfectly justified in making such an order.

(2) 1 B. L. R., A. Cr., 20.

(3) 3 B. L. R., A. Cr., 4.

(4) *Before Mr. Justice Kemp and Mr. Justice Markby.*

IN THE MATTER OF THE PETITION OF KALIDAS BHUTTACHARJEE.

3rd August 1869.

KEMP, J.—This was a reference, under section 434 of the Code of Criminal Procedure by the Sessions Judge of the 24 Pergunnas, in a case in which he is of opinion that the order of the Cantonment Magistrate of Burrackpore is illegal, and ought to be quashed. It appears that in this case, Kalidas Bhuttacharjee petitioned the Magistrate that the defendant, Mahendranath Chuttopadhyay, was erecting a wall, which obstructed the drain of his (the plaintiff's) house. His petition was presented on the 8th June, and Kalidas was examined briefly. He stated that the drain was an old one, and that Mahendranath, in erecting a wall, was obstructing that drain. The Magistrate directed the Police to stop the erection of the wall, and intimated his intention of visiting the

(a) 4 W. R., Cr., 12.

Baboo Rasbehari Ghose for Lachmipat Sing.

Baboo Jagadanand Mookerjee for Government.

The judgment of the Court was delivered by.

LOCKH, J.—After reading the report of the Judge, we think that the order passed by the Magistrate under section 62 of the Criminal Procedure Code

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spot in person. This was on the 8th June; and on the 11th June, the Magistrate took up the case, and held that section 308 of the Criminal Procedure Code did not apply to the case; but as there was no apprehension of a breach of the peace, he referred the plaintiff to a Civil Court for redress. On the same date, the Magistrate states that, after writing the above order, section 62 of the Code of Criminal Procedure Code was brought to his notice as one under which he could dispose of the case; and that as he was of opinion that the plaintiff was in possession of the drain, and the defendant's building a wall would cause an obstruction of the drain, and an inconvenience and annoyance to the persons living in the house, he should be prevented from doing so. He therefore made an order, under section 62, that the defendant was to leave the drain open, and to cease building the wall. It has been contended before us that, having passed the first order, the Magistrate was not competent to pass any orders at all under section 62; and that even if he was competent to do so, he ought to have given the defendant an opportunity of being present, and of being heard, so as to enable him to shew cause why such an order should not be passed. We think that, on the first contention, the Magistrate was competent when he found that the plaintiff's case did not come under the section under which he had put it, viz., section 308, to apply any other section of the Code of Criminal Procedure which applied to that case; but we think that, before proceeding to apply section 62, the Magistrate ought to have given the defendant, Mahendranath, an opportunity for showing cause, either by giving evidence or showing in any way in his power why the provisions of section 62 should not be applied to this case. Not having done so we think that the decisions of the Magistrate are irregular, and that they must be set aside. This order will not prevent the Magistrate, from taking up the case again on a formal application from Kalidas Bhuttacharjee; and after hearing both parties, and making necessary inquiries, from

passing such orders as he may deem right and proper.

MARREY, J.—I am of the same opinion. There is a good deal of what was said by the Sessions Judge in his order of reference with which I am not at present prepared to concur; nor am I at present prepared to say that this was not a case in which the Magistrate could pass an order under section 62, or that there was not evidence before him sufficient for that purpose. Moreover, my opinion at present is that a Magistrate is not bound to adhere to any particular section which may happen to be mentioned by the complainant in his complaint, but he may apply any section of the law which he thinks applicable to the case as long as the parties are not misled, and as long as the proper procedure prescribed for the purpose has been observed. Nor do I doubt that a Magistrate who has made an order which he finds to be wrong may re-call that order, and in its stead substitute any other order he may think right under the law. But my ground in concurring to set aside the orders of the Magistrate in this case is that the alteration made by the Magistrate was made in the absence of the parties after they had left the Court, and there is nothing in this record which could satisfy us that it was brought to the notice of the parties that that order was about to be re-called, or that they had any opportunity of showing cause why it should not be so recalled and altered. The order passed under section 62 is thus illegal, being passed *ex parte* by the Magistrate, without the knowledge of the parties, and in a manner behind their backs after they had left the Court, thinking that the case had been finally disposed of by the Magistrate under another section, and having no idea that the first order passed by the Magistrate was going to be set aside. On that ground, and on that ground alone, I think that the Magistrate's orders should be set aside.

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 PAT SING. must be set aside. Of course, as the Judge says, this will not prevent the Magistrate from passing a fresh order, after hearing evidence and giving the parties opportunity to show cause, but he cannot pass an order, without first issuing a rule to show cause.

Before Mr. Justice Phear and Mr. Justice Mitter.

1870
 July 13. MAHOMED ALI AND OTHERS (PLAINTIFFS) v. JUGAL RAM CHANDRA (DEFENDANT).*

Right of Way—Questions of Fact.

THIS was a suit to enforce a right of way over the land of the defendant. The defendant denied the existence of any right of way over his land.

The Moonsiff found from the report of the Ameen that there were traces of a road over the plaintiffs' land, and from the evidence of witnesses (one of whom had deposed to the effect that the plaintiffs had used the road for 8 or 10 years; another, that it had been used for 10 or 11 years; and a third that it had been used for 14 years) that the plaintiffs had used the road for a period of 14 years previous to the defendant's obstruction to such user. He accordingly passed a decree in favor of the plaintiffs.

On appeal, the Judge found that the land in dispute had been settled with the defendant by the Government in 1867; that there was no reservation of any right of way in such settlement; that, previous to such settlement, the land had remained unassessed waste land, of which the Government was the sole proprietor; that the public are generally allowed by Government to use these lands while they remained unassessed to cut timber and collect jungle product. He held that such use could not confer a prescriptive right and even if it did, the silence of the plaintiffs at the time of the settlement raised a presumption that they had not used the lands long enough to raise such a right. He accordingly dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboo Kaliprasanna Roy for the appellants,

Baboo Taraknath Sen for the respondent.

The judgment of the Court was delivered by

PHEAR, J.—We think that there is no error of law in the judgment of the lower Appellate Court.

That Court was called upon by the plaintiffs to declare that they had a right of way over certain lands belonging to the defendant; and the plaintiffs supported their claim of right by certain evidence of user,

* Special Appeal, No. 458 of 1870; from a decree of the Deputy Commissioner of Cachar, dated the 18th December 1869, reversing a decree of the Moonsiff of that district, dated the 7th September 1869.

The Court below has refused to infer from that evidence that the plaintiffs have the right which they claim. It does not appear to us that the Judge made any error of law in refusing to draw that inference.

As far as we can see, the evidence of user was in its character very indefinite. There was very little, if anything, to show that it was user as of right against the defendant and his predecessors in the possession of the land. Indeed, according to the case of both parties, such user as had taken place appears, for a considerable portion of the time at least, to have been a user by passing and re-passing over waste and jungle lands which nobody had any interest in disputing.

There was also evidence which tended to rebut the presumption as to the right which might possibly be justifiable upon the user alone, and the lower Appellate Court drew attention to that evidence, and argued from it that the plaintiffs never had in fact the right which they claim.

We do not, in dismissing this appeal, say that, had the lower Appellate Court, in its discretion and on a full view of the evidence on the record, come to the opposite finding to that at which it has come, that finding would necessarily have been bad in law.

Several cases have been cited to us in which this Court has declined to interfere with findings of fact which have been come to by Courts of regular appeal upon certain evidence of user. But this Court has never yet undertaken to say that user of a specified kind must necessarily in law lead to the inference that the party who has enjoyed that user had a right of way. In all cases where a right of way comes in question, and the party claiming the right supports his claim by evidence of user only, the Court, which is the judge of fact, must satisfy itself as best it can upon that evidence, having regard to all the circumstances under which the user took place, whether or not the user was founded on actual right. The guiding principle to be observed is that open user of another person's land for the purposes of a road or path-way, if continued without interruption for a long time, and not shewn to be attributable to permission or sufferance on the part of the owner, properly induces the presumption that the user was of right. The only other alternative would be that each passing and re-passing was a trespass, and the law will rather presume that acts, such as these constantly repeated for a considerable length of time before all the world, are rightful than that they are wrongful.

The sooner it is understood that these questions are substantially questions of fact to be determined upon the evidence furnished by the litigants, the better it will be for the interests of the parties to these suits.

We dismiss this appeal with costs.

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MAHOMED ALI
v.
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CHANDRA.

1870
August. 24.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

**NARSING PORKAET (DEFENDANT) v. MUSSAMAT BEWAH
(PLAINTIFF) AND OTHERS (DEFENDANTS).***

Registration—Act XX of 1866, s. 48—Unregistered Deed of Immoveable Property—Possession—Priority.

Where possession of immoveable property has been given under an unregistered lease, a subsequent grantee of a registered lease cannot maintain a suit to evict the lessee in possession, on the ground of the priority of his deed under section 48, Act XX of 1866.

Baboo *Ambika Charan Banerjee* for appellant.

Baboo *Jadab Chandra Seal* for respondent.

THE facts of the case sufficiently appear in the judgment of the Court which was delivered by

JACKSON, J.—The judgment of the lower Appellate Court in this case is insufficient.

The plaintiff sued to recover possession of this land from the defendant, upon the strength of a potta granted by the widow, who was in the enjoyment of the estate of her late husband. The defendant alleged that he was in possession under a lease granted to him by the husband himself in his life-time.

That lease, it appears, was one which, under the provisions of the Registration Act, should have been registered, but it was not so registered. It was, notwithstanding, received in evidence by the Moonsiff. The Subordinate Judge, on appeal, thought that the Moonsiff was wrong in admitting this unregistered potta, but, agreeing with the Court below apparently in thinking that the plaintiff had made out his potta, gave judgment for him, allowing his cross-appeal, and dismissing the appeal of the defendant. It is alleged by the defendant that he not only had a lease of this kind, but that, in pursuance of the lease, possession had been made over to him and rent received by the land-lord. It was not, therefore necessary for him to be made to prove the execution. If the case made by him were true, the other facts would give him a sufficient title to invalidate the claim of the plaintiff.

It has been held in a judgment, to which I was a party, although the judgment was written by Mr. Justice Markby, in *Selam Sheikh v. Baidonath Ghatak* (1), that where possession has been given,—that is, where effect has been given to a document by the transfer of immoveable property,—the provisions of section 48, Act XX of 1866, will not apply; and therefore, if the lease to the defendant in this case be dealt with merely in the view of a parol verbal contract, the lease granted to the plaintiff subsequently, though registered, will not prevail.

We think, therefore, that the case must go back to the lower Appellate Court, in order that it may find upon the evidence whether the defendant had, in fact, got a potta from the husband of the widow, and whether, under that lease, the defendant had got into possession of the land and paid rent.

* Special Appeal, No. 262 of 1870, from a decree of the Subordinate Judge of Midnapore, dated the 8th December 1869, affirming a decree of the Moonsiff of that District, dated the 27th April 1869.

(1) 3 B. L. R., A. C., 312.

Before Mr. Justice Markby.

SRIMATI RUKKINI DASI v. KADARNATH GHOSE AND OTHERS.

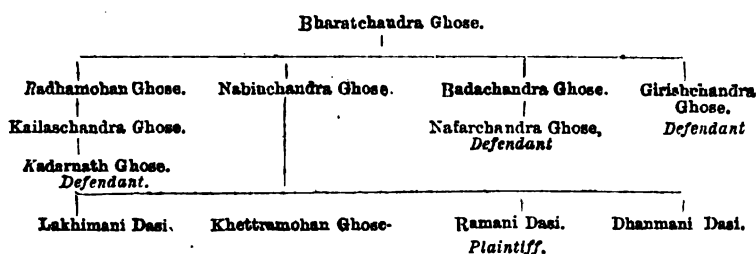
1870
August 9.

Hindu Law—Inheritance—Sister.

A sister cannot succeed her brother as heir by Hindu law:

This was a suit for partition of certain moveable and immovable property situated in the town and suburbs of Calcutta and for an account.

The following was the pedigree :—



Bharatchandra Ghose, a Hindu inhabitant of Calcutta died in 1244 (1837-1838) intestate, leaving him surviving his widow, Srimati Dayamayi Dasi, and four sons, Radhamohan Ghose, Nabinchandra Ghose, Badanchandra Ghose and Girishchandra Ghose. Nabinchandra died in 1247 (1840-1841) intestate, leaving him surviving his widow, Srimati Brommomayi Dasi; an infant son, Khettramohan Ghose; and two daughters, the plaintiff and Srimati Dhanmani Dasi. On the 29th Bhadra 1262 (September 13th, 1855), Khettramohan Ghose died intestate and childless, leaving him surviving his mother, Brommomayi Dasi; his widow, Srimati Lakhimani Dasi; and his sisters, the plaintiff and Srimati Dhanmani Dasi. Srimati Lakhimani Dasi died about a year after her husband, and Brommomayi Dasi and Dhanmani Dasi died in Aswin 1268 (September and October 1861). The plaintiff was married in 1260 (1853), and a son was born to her in 1263 (1856) who died unmarried and intestate; in Aghran 1262 (November and December 1855), Badanchandra Ghose died intestate, leaving him surviving his widow, Srimati Bimola Dasi, and an only son, Nafarchandra Ghose; and in Kartik 1276 (October 1869), Radhamohan Ghose died intestate, leaving him surviving his widow, Srimati Harimani Dasi; and a grandson, Kadarnath Ghose, an infant under the age of 16 years; and his daughter in-law, Srimati Saradamani Dasi, the mother of the said Kadarnath Ghose. The plaintiff therefore prayed that she might be declared to be entitled to the share of Nabinchandra Ghose in the estate of Bharatchandra Ghose, with all accumulations and additions thereto; that an account might be taken of what the estate, with such accumulations and additions, consisted, and for such further or other relief as the Court should think fit.

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During the hearing of the suit, it was asked that the plaintiff might be allowed, in case the Court thought she was not entitled to the inheritance as claimed, to put in a claim for maintenance, and to raise an issue as to the amount thereof. The defendants objected to this claim, it not having been preferred either in the plaint or written statement, and the Court refused it.

Mr. Bonnerjee (Mr. Ingram with him), for the plaintiffs, contended that the plaintiff was entitled to inherit from her brother. According to the principle laid down by MITTAR, J., in the case of *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* (1), those who could confer spiritual benefits on the deceased were entitled to inherit; and a sister could confer spiritual benefits on her brother.

Mr. Creagh (Mr. Piffard with him), for the defendants, contended that by Hindu law, a sister could not inherit from her brother, but the property would go to the paternal uncles and cousins, and that a sister could not confer spiritual benefits on her brother. He referred to *Shama Churn's Vyavashta Darpana* 226, and the cases there cited, and to *Ram Lal Deb v. Mussamut Mag nee* (2) *Kalee Pershad Surma v. Bhairabee Dabee* (3).

MARKBY, J.—In this case the question which is raised for my decision is whether the plaintiff, as sister of Khettramohan, is entitled, under the Hindu law, to succeed to his property in preference to Khettramohan's uncle, his uncle's son and his uncle's grandson, who are the defendants. Mr. Bonnerjee who appears for the plaintiff, has very candidly and properly admitted that the direct authorities on the point are against him. I express no opinion whatever whether those authorities are correct or not. But Mr. Bonnerjee maintains that the recent exposition of the law laid down in the case of *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* (1), has introduced a principle of inheritance, which, if applied to this case, would shew that those decisions were based on a misconception of the law. As I before said whether they are so or not, I express no opinion whatever. It seems to me that that question ought properly to be raised not here, but before the appellate Bench. I think that sitting here I should follow the principle laid down in more than one case, and especially in the case of *Raj Koonwaree Kirpa Mayee Debeah v. Rajah Damoodhur Chunder Deyb* (4), and that I ought to hold that a sister is not the heir of her brother; that being so, the plaintiff must fail in this suit, which is a suit for a partition. The suit is dismissed with costs on scale No. 2.

Attorney for plaintiff: Mr. Watson.

Attorney for defendant; Mr. Leslie.

(1) 5 B. L. R., 15.

(2) 1 W. R., 227.

(3) 2 W. R., 180.

(4) 7 Sel. Rep., 192.

Before Mr. Justice Loch and Mr. Justice Morkby.

IN THE MATTER OF RAMDYAL SING.*

Act XX of 1865, s. 34—Conviction by a Magistrate for practising as a Mookhtar in the Revenue Court without a Certificate—jurisdiction.

1870
Nov. 9.

Reference.—Mr. D. M. Testro, Assistant Magistrate of Khoordah, has fined the appellant, under section 34 of Act XX of 1865, for practising as a Revenue Agent in the office of the Assistant Collector of Khoordah, without having the certificate required by the Act.

This order appears to me to be illegal, as such a fine could only be imposed by the Revenue officer in whose Court the appellant practised. I therefore forward the papers of the case, in order that the sentence may be set aside as illegal.

Order of the High Court.

LOCH, J.—We think that there has been a formal error on the part of the Assistant Magistrate in transferring this case from the Revenue to the Criminal side of his Court, and trying it in his capacity of Assistant Magistrate and not in that of Assistant Collector. This error, however, does not appear to be material, as Mr. Testro is both Assistant Collector and Assistant Magistrate, and the offence was committed before him in the former capacity, and as Assistant Collector he might have disposed of the case. The error, we think, may be rectified by his drawing up a fresh order in his capacity of Assistant Collector and filing the proceedings in the Revenue side of his office.

Before Mr. Justice Norman.

1870
August 26.

ROBERT LAOHLAN AND OTHERS v. SHAIK ABDULLA.

Plaint—Signature and Verification—Practice.

See also
XII B.L.R.36

Where the plaintiffs described themselves as lately carrying on business under the name of C. and Co., held, that there was no irregularity in the plaint being signed by C. and Co., and verified only by A. B., one of the partners.

The plaintiffs in this suit were Robert Lachlan, Thomas Greenhill, and Arthur Bois, lately carrying on business in co-partnership at Dharramtolla in Calcutta, under the style and firm of Cook and Co., and the plaint was signed "Cook and Co." and verified by Arthur Bois alone.

Mr. Ingram, on behalf of the defendant, applied, on notice, to have the

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack, under his letter No. 251, dated 23th September 1870.

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plaint taken off the file. He contended that, under section 27, Act VIII of 1859 (1), the plaint ought to be subscribed and verified by all the partners. If only one partner knew all the facts of the case, he ought to have obtained the permission of the Court to subscribe and verify alone under section 28(2). Besides, in this case, the partners say they lately carried on business in partnership, consequently the firm of Cook and Co. did not exist as far as the plaintiffs were concerned; and the simple signature of Cook and Co. was therefore not sufficient. Supposing the statements in the plaint were all false, the defendant would not be able to prosecute any of the plaintiffs, except Bois.

The *Advocate-General* (*offg.*) *contra* was not called upon.

NORMAN, J.—In this case the plaint has been admitted, and supposing there were any irregularities in the subscription and verification, I certainly would not take it off the file now. But it seems to me that there are no such irregularities as supposed by Mr. Ingram. It has been the practice of this Court in a suit brought by a firm to allow a member of the firm to subscribe and verify the plaint; and even if it were a wrong practice, which I do not think it is, I should be disinclined to interfere with it. As regards the objection that the firm of Cook and Co. does not exist as far as the plaintiffs are concerned, the old firm continues to exist so far as it is necessary for the winding up of its business. For that purpose the members of a partnership are entitled to use the name of their late firm so long as the partnership has not been wholly wound up. I think the name of Cook and Co. has been properly used. [Mr. Ingram. It does not appear it has been used by any member of the firm.] NORMAN, J.—If it has not, the signature is a forgery.

Application dismissed

Attorneys for plaintiff: Messrs. Pittar and Camell.

Attorney for defendant: Mr. Dover.

(1) *Act VIII of 1859, s. 27.*—"The plaint shall be subscribed by the plaintiff and his pleader (if any), and shall be verified at the foot by the plaintiff in the manner following, or to the like effect: I, A. B., the plaintiff named in the above plaint, do declare that which is stated therein is true to the best of my information and belief."

(2) *Act VIII of 1859, s. 28.*—"If the plaintiff, by reason of absence, or for other good cause, be unable to subscribe and verify the plaint, the Court may allow the plaint

to be subscribed and verified on behalf of the plaintiff by any person whom the Court may consider competent to make the verification. In suits by a Corporation or a Company authorised to sue and be sued in the name of an officer or trustees, the plaint shall be subscribed and verified on behalf of the Corporation or Company by any Director, Secretary, or other principal officer of the Corporation or Company who may be able to depose to the facts of the case."

Before Mr. Justice E. Jackson and Mr. Justice Mitter.

MAHARAJA DHIRAJ MAHTAB CHUN BAHADUR (DEFENDANT) v.
SHAGOR KUNDU (PLAINTIFF).*

1870
August 18.

Jurisdiction—Special Appeal—Interference by the High Court in a Case cognizable by the Small Cause Court—Act XXIII of 1861, s. 13.

In a suit cognizable by the Small Cause Court, and in which no special appeal lies to the High Court under Section 13, Act XXIII of 1861, the High Court exercised their extraordinary powers and dismissed the suit.

THE plaintiff, at a sale held in execution of a decree passed in favor of the defendant, purchased the right, title, and interest of the judgment-debtor of and in, a certain parcel of land. At the suit of a third party, it was declared that the judgment-debtor had no right in the property sold. The plaintiff brought the present suit against the defendant for recovery of rupees 63-2¹/₂ being the amount paid by him into Court for the purchase of the property sold in auction, and taken out therefrom by the defendant in satisfaction of his decree.

The defence set up was that the plaintiff was not entitled to a refund of the purchase-money as he should have used due diligence before his purchase in ascertaining the right which was to be sold.

The Moonsiff passed a decree in favor of the plaintiff.

On appeal, the Subordinate Judge confirmed the decree of the lower Court. The defendant appealed to the High Court.

Baboo *Rashbehari Ghose* for the appellant.

The judgment of the Court was delivered by

JACKSON, J.—We think the judgment of the lower Appellate Court ought not to be allowed to stand.

In this case, the plaintiff had, in execution of decree, purchased the rights and interests of his judgment-debtor in a certain jote. Subsequently, in the course of proceedings in the Civil Court, it was determined that the said judgment-debtor had no rights and interests whatever in that jote, and the plaintiff, as purchaser, accordingly, obtained nothing by his purchase. He has now brought this suit to recover from the decree-holder the price which he paid at the auction sale.

Both Courts have decreed the claim. They seem to rest their decision upon the case of *Greesh Chunder Pottar v. Sookhooda Moyee Dabee* (1), but this

* Special Appeal, No. 211 of 1870, from a decree of the Subordinate Judge of East Burdwan, dated the 30th November 1869, affirming a decree of the Moonsiff of that district, dated the 18th July 1869.

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 KUNDU.

decision, in the first place, is by no means analogous to the case, and in the next place, the decision itself was set aside by the Full Bench decision in *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (1), and it is quite clear that the purchaser at such an auction sale is at liberty to purchase or not as he chooses, that the maxim of *caveat emptor* most thoroughly applies, and that he has no claim as against any person for his own act in purchasing certain property as the rights and interests of a judgment-debtor, even if it should afterwards turn out that that property did not belong to the said judgment-debtor.

We have no doubt whatever that, upon the law of the case, the decision of the Judge ought to be set aside, and the special appeal to this Court allowed.

Some contest has been raised before us as to whether a special appeal lies in this case; but whether it is so or not, we think this is a case of that sort that we ought to set aside the decision under our extraordinary powers, even if we could not interfere in special appeal.

We set aside the decision of the Judge, and dismiss the plaintiff's suit with costs.

(1) 4 B. L. R., F. B., 11.

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—	570
<i>See PRACTICE.</i>	

Act XIV of 1859 s. 1—Cause of Action—Res Judicata. A., a Hindu of Gya, died, leaving a sister B., and C, the son of a deceased sister. On A.'s death, B. took possession of the property left by A. In a suit by C. against B. for recovery of possession thereof, as heir to his maternal uncle, the Court of first instance held that B. should retain possession of the property during her life-time, without power of waste; and that on her death, C. should be entitled to the possession thereof. This was reversed by the High Court on appeal, who held that "the decree should have been simply a decree of dismissal" of the plaintiff's suit.

B. died leaving an adopted son, D. C. sued D. for recovery of possession of the property, the subject-matter of the former suit, on the ground that D. was not the adopted son of B., and that C., "who came within the class of *bandhus*, was entitled to succeed to the property left by A. and B., there being no nearer heir in existence."

Held, that section 2, Act VIII of 1859, did not bar the suit.

BABOO MOHAN LAL BHAYA GYAL v. LACHMAN LAL ... 663

Res Judicata—Cause of Action. In execution of a decree, the right, title, and interest of A. in a certain property was sold and purchased by B. In execution of another decree, the right, title, and interest of A. and C. in the same property was sold and purchased by D. In a suit by A., the sale to B. was set aside; but on appeal, the decision of the Court of first instance was, upon consent of the parties, set aside, and the sale allowed to stand good. D. sued for possession of the share of A. and C. in the property purchased by him, and obtained a decree for possession of the share of C. only. D. now sued to set aside the sale to B. and for possession of the share of A. *Held*, that the suit was not barred by section 2, Act VIII of 1859.

CHANNU LAL SAHU v. MANU LAL ... 220

ss. 2, 110—Remand—Non-appearance of Parties. When a suit has been remanded by the Appellate Court, and then dismissed by the Court of first instance for non-appearance of the parties, the plaintiff is not debarred thereby from bringing another suit upon the same cause of action against the same defendant.

RASHUNATH SING v. RAMKUMAR MANDAL ... App. 64

s. 7—Cause of Action. At a sale for arrears of rent, A. became the purchaser of a certain patni talook. B., whose patni right had been sold, sued for and obtained a decree for reversal of the sale on the ground of irregularity. In the mean time, A. had committed default, and the patni was again sold for arrears of rent. The zemindar drew out from the Collectorate the amount due to him. C., who had bought B.'s right, title, and interest in his decree, now sued A. for recovery of the surplus proceeds of sale in the hands of the Collector, and obtained a decree.

He afterwards sued A. for mesne profits for the time during which he was in possession of the patni talook. This was a suit by C. against A. for recovery of the amount drawn out by the zemindar, on the ground that, in consequence of A. having collected the rents from the talook, which were to go towards payment of the rent due to the zemindar, and having fraudulently withheld such payment, he had sustained damage to the extent of the amount taken by the zemindar.

Held, that the suit was barred by section 7, Act VIII of 1859.

TARINI PRASAD GHOSH v. KHUDAMANI DEBI	...	...	184
ACT—1859—VIII, s. 15	...	...	508
See HINDU WIDOW.			

_____, s. 17, cl. 2—*Recognized Agents*.] A recognized agent, under clause 2, section 17, Act VIII of 1859, cannot prosecute or defend a suit in his own name.

A gomasta of a firm ceases to be a recognized agent under clause 2, section 17, Act VIII of 1859, when the business of the firm has ceased before the institution of the suit.

MOKHA HARAKRAJ JOSHI v. BISSEWAR DAS	...	App.	11
_____, s. 30	...	App.	15
See STAMP.			
_____, ss. 73, 350	...	...	371
See PARTIES.			
_____, s. 78	...	...	215

See PRISONERS' TESTIMONY ACT.

_____, ss. 92, 96—*Injunction—Compensation, Suit for—Limitation Act (XIV of 1859), s. 1 cl. 2.*] A. having brought a suit against B. obtained and issued, on the 24th July 1868, an injunction against him under section 92, Act VIII of 1859. The suit was, on the 18th August 1868, dismissed: but no compensation was awarded to B. under section 96 of Act VIII of 1859, in respect of the injunction which had been issued against him. A. and B. both appealed; the former against the decision dismissing his suit, the latter for compensation. Both appeals were dismissed on the 23rd November 1869.—B.'s, because it was engrossed on a stamp paper of the value of eight annas only.

B. on the 16th December 1869, then instituted a suit against A. in the Small Cause Court, for damages in consequence of the injunction which A. had caused to issue against him in his suit.

Held, that B. was not debarred, by section 96 of Act VIII of 1859, from instituting a suit against A. for damages, there not having been an award of compensation under that section. The cause of action accrued from the time at which the plaintiff was first damaged by the wrongful injunction; continued as long as the injunction remained in force; and limitation began to run as soon as the injunction was at an end.

NANDA KUMMAR SHAHA v. CHUR SANKAR	...	App.	4
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_____, s. 194	...	...	167
See ACT XVI OF 1864, s. 51.			
_____, s. 205	...	...	382
See EXECUTION.			

_____, s. 206—*Act XXIII of 1861, s. 11—Payment out of Court—satisfaction of Decree not certified—Suit to recover Money*

paid out of Court.] A. a judgment-debtor, paid to B., the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B. failed to certify this payment to the Court, and afterwards executed her decree for the full amount.

In a suit by A. against B. for recovery of the amount previously paid out of Court, in satisfaction of the decree, *held* that, notwithstanding section 11 of Act XXIII of 1861, the suit was maintainable.

GUNAMANI DASI v. PRANKISHORI DASI 223
ACT—1859—VIII, ss. 208, 284, 285, 287, 290—*Assignee of a Decree—*

Execution, Power of the Court to which a Decree has been transmitted for.] The assignee of a decree should apply to the Court, which passed the decree, and not to the Court to which the decree had been forwarded under section 285, Act VIII of 1859, for execution, for the purpose of being substituted in the place of the original decree-holder.

The word "Court" in section 208, Act VIII of 1859, does not include the Court to which a decree has been transferred for execution.

SHEO NARAYAN SING v. HARBANS LAL 497
—, s. 217 App. 65

See DISMISSAL OF PETITION FOR NON-APPEARANCE.

—, ss. 221, 232, 240, 242, and 351 691
See OFFICIAL ASSIGNEE.

—, s. 230—*Evidence—Title—Possession.*] On an application under section 230, Act VIII of 1859, in the investigation of the matter in dispute, the Court may go into the question of title. It is open to the applicant to give evidence of title beyond mere possession, and the decree-holder may prove his title to the property.

RADHA PYARI DEBI CHOWDHRAIN v. NABIN CHANDRA CHOWDHRY 708

—, s. 283—*Seizure of Moveable Property—Mode of Executing Warrant against Moveable Property—Removing Locks.*] Under section 233, Act VIII of 1859, a Nazir, authorized to execute a warrant by attachment of moveable property has power to remove locks put by the judgment-debtor on the doors of godowns, or other places where his property is stored, and put his own locks thereon, for the purpose of attachment and safe custody of the property.

SODAMINI DASI v. JAGESWAR SUR App. 27
—, ss. 233, 234 386

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—, ss. 236, 265 155

See MOVEABLE PROPERTY,

—, s. 271 380

See REDEMPTION, EQUITY of.

—, ss. 273; 280 App. 21

See ACT XXIII of 1861, s. 8.

—, ss. 276, 278 App. 79 80

See SUBSISTENCE MONEY.

—, s. 281—"Bad Faith."] Bad faith in section 281, Act VIII of 1859, means bad faith not only in respect of the application, but includes bad faith on previous occasions.

SMITH v. BOGGS App. 22

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—, s. 350	App. 10
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—, s. 355— <i>Evidence, Reception of, in Appellate Court, though not produced in Lower Court.</i>	
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—, s. 6	App. 18
<i>See</i> ACT VIII OF 1865 (B.C.), s. 16.	
—, s. 13— <i>Notice—Special Appeal.</i>] In a suit for enhancement of rent, it was objected, on behalf of the defendant, in special appeal, that service of notice had not been proved. <i>Held</i> , the question was one of fact, and the objection ought therefore to have been taken in the Court of first instance.	
C. J. DUMAINE v. UTTAM SING	App. 44
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<i>See</i> MOVEABLE PROPERTY.	
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—, s. 1	663
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—, CL. 2	App. 4
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—, CL. 9	84
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—, CL. 15	396
<i>See</i> DEPOSIT.	
—, s. 4	619
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—, s. 8	550
<i>See</i> MUTUAL DEALINGS.	
—, s. 20. <i>See</i> EXECUTION OF DECREE.	
— <i>Execution—Limitation—Proceeding.</i>] So long as an actual <i>bond fide</i> contest is going on in Court between a decree-holder and the judgment-debtor as to the judgment, there is a pending “proceeding” within section 20 of Act XIV of 1859, and the period of limitation must be computed from the Court’s decision.	

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The decision in the case of <i>Ram Sahaye Singh v. Degun Singh</i> commented on and approved of.	
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ACT—1859—XIV— <i>Proceedings to keep alive a Decree—Bonâ fide Proceedings.</i>] The question as to whether proceedings which had been taken to execute a decree had been taken <i>bonâ fide</i> to keep alive such decree, is a question of fact, and no special appeal lies from an order finding that the proceedings taken were taken <i>bonâ fide</i> .	
BHUBAN MOHAN CHATTOPADHYA <i>v.</i> SAUDAMINI DEBI	App. 59
ss. 20, 22— <i>Limitation—Summary Decision.</i>] An order of a Court dismissing an application for execution of a decree, on the ground that it is barred by the Law of Limitation, is not a "summary decision" within the meaning of section 22, Act XIV of 1859. It is an order within the meaning of section 20 of that Act.	
MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR <i>v.</i> RA-CHARAM HAZRA	162
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1861—XXIII, s. 8— <i>Act VIII of 1859, ss. 273, 280.</i>] Section 8 of Act XXIII applies only to applications made under section 273 of Act VIII of 1859, not to applications made under section 280.	
SMITH <i>v.</i> BOGGS	App. 21
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s. 36. See CRIMINAL PROCEDURE CODE, s. 36.	
s. 62. See CRIMINAL PROCEDURE CODE, s. 62.	
<i>Nuisance, Removal of—Power of Magistrate.</i>] Under section 62 of the Code of Criminal Procedure, a Magistrate has no power to issue an order, <i>ex parte</i> , to cut down trees, on the representation of a party, supported by the report of the Police, that the existence of the trees was a nuisance.	
THE QUEEN <i>v.</i> RAM CHANDRA MOOKERJEE	131
ss. 66, 273, 439— <i>Complaint to be reduced to Writing—Irregularity in the Commencement.</i>] On receipt of a petition from the complainant, the Magistrate, without examining him and reducing his examination into writing, and obtaining his signature thereto, or appending his own signature as Magistrate, referred the petition to a Deputy Magistrate for trial. The Deputy Magistrate tried and convicted the accused.	

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On a reference from the Sessions Judge, on the ground that the proceedings were irregular under section 66, Act XXV of 1861, and that, therefore, the order of the Deputy Magistrate was without jurisdiction, *held*, that the petition was sufficient, and that the Magistrate was justified in making over the petition to a Deputy Magistrate, who had the full powers of a Magistrate, for enquiry and trial.

THE QUEEN v. UMESH CHANDRA CHOWDHRY...	...	160
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— X, s. 14	...	App. 10
See STAMP.		
— 1863—XX	...	App. 55
See SUIT FOR DECLARATION OF TRUSTS OF TEMPLE.		
XXI, ss. 27, 39.— <i>Appeal—Jurisdiction—Value of Suit—Value of Decree.</i>]		
The Recorder of Moulmein, in trying an administration suit, valued at rupees 13,000 found as to rupees 6,000 in value of the property claimed that it did not exist. The value of the amount decreed by him amounted to rupees 7,000.		
<i>Held</i> that, under Act XXI of 1863, sections 27 and 39, the appeal lay in the first instance to the High Court, and not to the Privy Council.		
HAWABI v. IBRAHIM SALI BEAY DAPTI	...	305
— 1864—III (B. C.), s. 87— <i>Act VIII of 1859, s. 2—Res-judicata—Limitation—Suit against Municipal Commissioners for Possession of Land.</i>]		
Previous to the institution of the present suit, one of the shareholders of the piece of land brought a suit against the Chairman of the Municipality for recovery of possession of his share. The other shareholders were made <i>pro forma</i> defendants in the suit. This suit was dismissed as barred by the law of Limitation. After the dismissal of the suit, the plaintiff brought the present suit for recovery of his share of the land, on the allegation that his tenant had relinquished the land within three months in consequence of his having been dispossessed by the Municipal Commissioners.		
<i>Held</i> , that the suit was not barred by section 2, Act VIII of 1859; and that section 87, Act III of 1864 (B. C.), did not apply.		
<i>Semble</i> .—Act III of 1864, s. 87 (B. C.), relates only to actions brought in respect of acts done by the Commissioner under that Act for the purpose of the Act.		
H. PRICE v. KHILAT CHANDRA GHOSE	...	App. 50
— XVI, s. 51— <i>Act XX of 1866, s. 53—Act VIII of 1859, s. 194—Registration—Bond—Power of Court to alter Terms of a Specially Registered Bond.</i>]		
By a bond specially registered under Act XVI of 1864, the obligor stipulated to pay the entire amount secured thereby, with interest at the rate therein mentioned, on a day therein mentioned. There was a further stipulation that, on		

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default of payment, the bond was to be enforced as a decree. On failure of payment, the obligee applied for execution under section 53, Act XX of 1866, but the Subordinate Judge ordered the payment to be made by instalments. On an application to the High Court under section 15 of the Charter Act, held that the Subordinate Judge had no jurisdiction to pass a decree on the bond altering or varying its terms. Section 194, Act XIII of 1859, did not apply.	
KHETTRA MOHAN BABOO v. RASHBEHARI BABOO ...	167
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—1865—VIII (B. C.), s. 16—Act X of 1859, s. 6 Sale of a tenure for Arrears—Right of Purchaser—Ejectment—Incumbrance by former Tenant.] A purchaser of a tenure sold under Act VIII of 1865 (B. C.), for arrears of rent, cannot, under section 16, eject a ryot who has acquired a right of occupancy, under section 6, Act X of 1859, under the former tenant.	
NILMADHAR KARMOKAR v. SHIBU PAL ...	App. 18
—Shareholder—Purchaser of Rights of holder of Fractional Share.] Section 16 of Act VIII of 1865 (B. C.) does not apply to the purchaser of the rights and interests of the holder of a fractional share in an under-tenure.	
HARASUNDARI DASI v. KISTU MANI CHOWDHRAIN ...	App. 37
—XI, s. 19—Immoveable Property—Moveable Property—Growing Crops.] Growing crops are “immoveable property,” and execution of a decree of a Small Cause Court cannot be had against them under section 19 of Act XI of 1865.	
GOPAL CHANDRA BISWAS v. RAMJAN SIRDAR...	194
—, s. 21—Small Cause Court Act (Mofussil).] A defendant, desiring a new trial of a case decreed against him in a Small Cause Court, must deposit in Court the amount of the decree passed against him and costs, at the time of giving notice of his intention to apply for the new trial. A subsequent deposit, though made within seven days from the date of decision, will not entitle the party to ask for a new trial.	
Semble —“The next sitting of the Court,” mentioned in section 21, Act XI of 1865, refers to the next sitting after the decision complained of; and the words “within the period of seven days from the date of the decision,” apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one Court.	
KAILAS CHANDRA SANNEI v. DAWLAT SHEIKH ...	App. 57
—XX, s. 34—Conviction by a Magistrate for practising as a Mookhtar in the Revenue Court without a Certificate—Jurisdiction.	
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ACTS OF GOVERNMENT OFFICIALS BINDING GOVERNMENT— <i>Act IX of 1859.</i> Where, by a decree of the Special Commissioner's Court, established under Act IX of 1859, a decree was made directing property to be made over to a claimant, the proceedings of officials making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or of the making over of the bulk of the property under it, <i>held</i> , to bind the Government as to the right of the decree-holder to the property.	
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AGENT OF COMPANY, AUTHORITY OF—*Corporation—Seal—Contract—Companies' Clauses Consolidation Act, 8 and 9 Vict., c. 16, s. 97—The Scinde Railway Act, 1857, 20 and 21 Vict., c. 160.]* The Scinde Railway Company was incorporated by 18 and 19 Vict., c. 115, for the purpose of making and maintaining Railways in India, and for other purposes. This was repealed by 20 and 21 Vict., c. 160, which authorized the Company to extend their operations, and extend their capital, &c. This Act, by section 3, declared the Companies' Clauses Consolidation Act, 1845, to be incorporated with it. By section 18, the Company have "a seal for use in India in lieu of the common seal "of the Company, and from time to time may vary and renew it, "and make regulations for its use; and except, as by this Act "otherwise expressly provided, every document sealed with such "seal, in conformity with such regulations or in pursuance of any "order of the directors, or of any authority given by the Company "under their common seal, shall be as valid and effectual as if the "common seal were affixed thereto." By section 54, "the Com- "pany, from time to time, may appoint and remove such commit- "tees, persons or person, as the Company think fit to act on behalf "of the Company in India or elsewhere, with respect to the mak- "ing, maintaining, managing, working, and using of the railways "and other works of the Company, and the control and conduct "of any of the affairs in India or elsewhere of the Company; and "may delegate to any such committee, persons, and person "respectively all or any of the powers of the Company and of the "directors and officers thereof which the Company thinks it expe- "dient that such committee, persons, and person respectively "should possess for the purposes of his or their respective appoint- "ment." In January 1867, E. was the Agent of the Company in India, and he entered, it was alleged, on their behalf, into a contract with the plaintiffs, for 60 sets of iron-work for low-sided waggons. The plaintiffs' firm did not deal in iron-work, and they had to get the goods manufactured for them in England. The Board of Directors were at the time supplying iron-work for the Company. There was nothing to show that E. had been appointed under the provisions of section 54 of the Act, 20 & 21 Vict., c. 160, nor was there any evidence of the extent of his power or authority. A specification of the contract differed from it, in that it stated the waggons to be covered waggons, and not low-sided waggons. The contract was not made under seal of the Company, nor was the iron-work, the subject of the contract, ever accepted by the Company. The defendants admitted that at the date of the alleged contract, E. was the Agent of the Company in India, but denied that his power extended to the making of such contract; they further stated that the contract, if entered into, had been afterwards cancelled.

Held, by PHEAR, J., that there was no evidence to show that E. had authority to make the contract. The contract was one which E. would have had power to make in writing only, under section 97 of the Companies' Clauses Consolidation Act, had he been appointed under section 54, 20 and 21 Vict., c. 160, but there was no proof of such appointment.

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<i>Held</i> , on appeal, that, assuming that B. had been appointed under section 54 with power as large as in the ordinary course could be conferred upon him under that section, the contract was not one by which, acting as such agent, he had power to bind the Company.	
STEWART v. THE SCINDE, PUNJAB, AND DELHI RAILWAY COMPANY	195
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————, PERMANENT.] Principle on which the Court will grant permanent alimony.	
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<i>See</i> STAMP. <i>See</i> VALUATION OF SUIT.	
———— Act VIII of 1859, ss. 324, 325—Award.] Two out of three arbitrators appointed in the case, submitted their award before the Moonsiff. The defendant, against whom the award had been made, applied to the Moonsiff to set aside the award, on the grounds of corruption and misconduct, and that the award was a nullity, inas much as only two out of three arbitrators had made the award. The Moonsiff overruled the objections, and passed a decree in terms of the award. On appeal to the Judge, the order of the Moonsiff was set aside, on the ground that the award was illegal, as two only of the three arbitrators originally appointed had made the award, and that the evidence did not prove the plaintiff's case.	
On an application to the High Court to set aside the order of the Judge, <i>held</i> , that, under section 325, Act VIII of 1859, the Judge had no jurisdiction to set aside the award when the Court of first instance had passed judgement according to the award.	
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a petition of appeal to the Privy Council presented to the High	
Court has been admitted and allowed, a party has no right of	
appeal to the Privy Council. If the petition is allowed to remain	
on the file of the Court, and is not prosecuted within a reasonable	
time, the Court has power to order its removal from the file.	
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AUTHORITY OF AGENT OF COMPANY. <i>See AGENT.</i>	
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<i>See APPEAL.</i>	
—— Submission—Completion—Delivery— <i>Act VIII of 1859,</i> <i>ss. 315, 318, 320.]</i> By an order of Court, of January 17th,	
1867, a suit was referred to two arbitrators, under section 312,	
Act VIII of 1859, who were to make their award in writing,	
and submit the same to the Court within three months. No	
order for enlarging that time was made. The first meeting of	
the arbitrators was held on May 22nd, 1867, and four subsequent	
meetings were held, at which all the parties attended, and evidence	
was taken; at the last of which meetings, namely, on 27th July, an	
objection for the first time was taken on behalf of the defendant	
that the time limited by the order of reference had expired, but	
the arbitrators proceeded with the reference. The award was	
made on 12th August 1867, and remained with one of the arbitra-	
tors until his death in August 1868. Subsequently it was pro-	

duced by the other arbitrator, on the application of the parties to the suit, and delivered to the successful party, by whom it was brought into Court on the 10th May 1870, and judgment was moved for in accordance therewith. *Held*, that the arbitrators had authority to make the award. The award was properly submitted to the Court. Section 320, Act VIII of 1859, does not make it necessary for the arbitrators to submit the award to the Court personally. Submission to the Court, under section 320, is not necessary to the completion of an award under sections 315 and 318.

Although an arbitrator may deliver his award to one of the parties, he ought not to hand over with it the proceedings, depositions, and exhibits.

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—, LEASE	...	...	234
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	<i>See</i> ACT I of 1845, s. 21.		

Suit for Confirmation of Possession and Declaration of Title—Review—Decree—Declaratory Decree—Res-Adjudicata.] A. brought a suit for a debt against B., obtained a decree, and attached certain land in execution. C. intervened, claiming the property as his: but, on the 28th March 1868, his claim was disallowed, on the ground that, in two suits previously brought against C. and others for possession of the same property, on the 30th December 1863, by X. and Y., whose interest had, pending the suit, been purchased by B., it had been decreed that the land belonged to B. The decrees in these suits were dated 13th and 19th January 1864; they were in favor of B., and ran in his name alone. C. had purchased a moiety of the property at an auction-sale on the 7th March 1859; X. and Y. claimed under a pre-existing mortgage over the same property, the equity of redemption under which had been foreclosed.

C. now brought a suit against A. and B. for confirmation of his possession, and a declaration of his title to the property. He alleged that B. was his servant, and had purchased the interest of X. and Y. in the property *benami* for him; that he (C.) had made the purchase with his own money in the name of B.; that the suits originally brought by X. and Y. had really been compromised; that while the decrees of the 13th and 19th January 1864 were nominally in favour of B., they were really in his (C.'s) favour; and that the suit brought by X. and Y. had been allowed to proceed in B.'s name, in order that C.'s title might be strengthened by a decree in his favour, B. being only nominally the decree-holder. C. also stated that, since his purchase on 7th March 1859, he had always been in possession, and he dated his cause of action from the 28th

March 1868, when his claim to the property which had been attached by A. in his suit against B. was disallowed.

The Subordinate Judge gave a decree in favor of the plaintiff C. B. alone appealed to the High Court.

Held, that C., not having been disturbed in his possession, and seeking a declaration of his title only and no relief, should have stated clearly and precisely what that title was; that as against A., who had not appealed, the decision of the subordinate Judge was final; that as between B. and C. the matter was *res adjudicata*; that C. could not go behind the decrees of the 13th and 19th January 1864, which had been passed in favor of B., and show that the purchase by B. and subsequent decrees were really *benami* for C. and in his favor. A decree, until it is set aside, is, as between the parties to it, conclusive both as to the rights of those parties and the character in which they sue.

On application for review of judgment, *held*, a party applying for a review of judgment must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous. In so showing cause (*first*), no point can be raised, which has been already discussed and decided on the original hearing of the appeal; and (*secondly*) no new point, which has not been raised at the hearing of the appeal, can be argued on the application for review.

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BENAMI PURCHASE IN CHILD'S NAME—*Presumption—Creditors claiming against Benami-holder—Strictness of Proof.*] Although a purchase by a Mahomedan with his own money of an estate in the name of his son raises a presumption of the son's name being used *benami* for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give, as respects strangers, a title to the son independent of and adverse to the father.

Where *bonâ fide* creditors of the ostensible owner of property are claimants on that property, the Court will require strict proof on the part of any one seeking to have it declared that he held it only *benami*.

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<i>See ACT XIV of 1859, s. 20.</i>	
BOND. <i>See</i> INSTALMENT BOND.	
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<i>See ACT XVI of 1864, s. 51.</i>	
—, FAILURE TO REGISTER	App. 46
<i>See CAUSE OF ACTION.</i>	
—, HOLDER. <i>See</i> BOTTOMRY BOND-HOLDER.	
—, SUIT TO RECOVER MONEY ON	App. 46
<i>See CAUSE OF ACTION.</i>	

BOTTOMRY BOND-HOLDER—*Ship, Sale of—Master's Lien for Wages—Priority.*] The charterer of a ship advanced money to enable her to complete the voyage, and obtained as security a "bottomry bond" signed by both the master and owner. On the completion of the voyage, the charterer got the ship arrested and sold, and the money was brought into Court. Before any order had been made for the payment of the proceeds out of Court, the master also had got the ship arrested at his suit for wages due, but no decree had been obtained. Subsequently, the charterer, without notice to the master, obtained an order of Court for the payment of the proceeds of sale to satisfy his bottomry bond. Thereupon, the master applied to restrain the charterer from taking the money out of Court, until the claim for wages had been first satisfied. *Held*, that the master had a lien on the proceeds for wages due to him at the time of the sale of the ship, prior to that of the bottomry bond-holder, and that he was entitled to have the proceeds retained in Court until the hearing of his claim.

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Suit to Recover Money advanced on a Bond before the Money became due—Failure to register a Bond—Breach of Agreement.] A. executed a bond in favour of B., but failed to cause the registration of the same. Before the amount secured by the bond became due, B. sued A. for recovery thereof, on the ground that, as A. had agreed to get the bond registered, but failed to do so, B. was entitled to recover the amount advanced by him. *Held*, that B. had no cause of action.

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COMMISSION— <i>Examination de bene esse</i> — <i>Evidence</i> —Act VIII of 1859, ss. 175, 179.] A <i>de bene esse</i> examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a commission.	
EDWARDS v. MULLER ...	252
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<i>Power of Subordinate Magistrate.</i>] A Subordinate Magistrate has no power to try an offence punishable under section 174 of the Penal Code committed against his own Court, but is bound, under section 171 of the Code of Criminal Procedure, to send the case, if in his opinion there is sufficient ground for investigation to a Magistrate having power to try or commit for trial.	
THE QUEEN v. CHANDRA SEKHAR ROY	100
CONTRACT	195
<i>See AGENT.</i>	
<i>Consideration—Promise by Brother to give Sister in Marriage.</i>] A certain amount of money had been paid by one Hindu to another in consideration of a promise by the latter that he would give his sister in marriage to the former. The girl's mother was alive. In a suit for recovery of the amount on the ground that the latter had failed to fulfil his promise, <i>held</i> , that the suit would lie.	
JOGESWAR CHAKRABATTI v. PANCH KAURI CHAKRABATTI ...	395
<i>Sale of Goods—Addition of "Fresh Goods"—Reference to High Court—Act XXVI of 1864, s. 7.</i>] R. G. G. and Co. entered into a contract to sell certain goods to A. S., N. S., both Calcutta firms. The contract, which was in a printed English form, was taken on the 18th December 1868 by one M., on behalf of the firm of R. G. G. and Co., to obtain the signature of the vendees, firm. It was signed on their behalf by A. S. Neither M. nor A. S. understood English, and no explanation was given of the terms of the contract to A. S. at the time he signed it, but there had been negotiations between M. and A. S., as to these goods prior to the time when A. S.'s signature was obtained. It did not appear that the goods had been identified in any way by the purchasers who had merely seen a sample. After his signature, A. S. wrote in Nagri "goods fresh, grenadines five cases, at 2 annas 3 pie per yard." A. S., N. S., afterwards, on the 9th February, 1869, paid rupees 1,000 as earnest-money, which was accepted by R. G. G. and Co., who then allowed further time for taking delivery of the goods, which, however, A. S., N. S., finding some of the goods were stained, declined to do. R. G. G. and Co., thereupon brought an action for breach of contract in not taking delivery, and a cross-suit was brought by A. S., N. S., to recover the rupees 1,000 paid as earnest-money.	
<i>Held</i> , that the words "fresh goods" after the signature of A. S. constituted part of the contract into which the parties entered, and by which they were bound.	
Where a case has been heard by a single Judge of the Small Cause Court, and a new trial has been applied for, and the case has been reheard by two Judges, the Court is bound, under section 7, Act XXVI of 1864, to refer the case for the opinion of the High Court, if requested to do so by either party to the suit, though the Judges do not entertain any doubt, or differ in opinion.	
MADHAB CHANDRA RUDAR v. AMRIT SING, NARAYAN SING.	
AMRIT SING, NARAYAN SING, v. MADHAB CHANDRA RUDAR ...	111
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<i>See HABEAS CORPUS.</i>	
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<i>See ACT XX of 1865, s. 34.</i>	

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CO-PROPRIETOR— <i>Injunction—Injury.</i>] The defendant was in possession of land under a potta granted by the ijaradars of the proprietors, and thereon commenced to build a house and plant a garden. The plaintiff, who had bought the right, title, and interest of one of the proprietors, sued to restrain him. He did not allege any injury. <i>Held</i> , that such suit would not lie.	
SRI CHAND v. NIM CHAND SAHU ...	App. 25
CO-RESPONDENT'S RIGHT TO BE HEARD IN APPEAL— <i>Adultery—Alimony—Divorce (Act IV of 1869,) s. 37—Access to Children—Costs.</i>] A husband brought a suit for divorce against his wife on the ground of her adultery; the co-respondent appeared in that suit. The respondent appealed on the ground (<i>inter alia</i>) that, on the evidence, the Court ought to have held that the adultery was not proved. <i>Held</i> , that in that appeal the co-respondent was not entitled to be heard in opposition to the appeal.	
The Court has power, under section 37 of Act IV of 1869, to order permanent alimony to the wife, when a husband obtains a divorce on the ground of her adultery. When the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage.	
KELLY v. KELLY AND SAUNDERS ...	71
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CRIMINAL PROCEDURE CODE (<i>Acts XXV of 1861 and VIII of 1869</i>)— <i>Counsel—Pleader—Prosecution.</i>] A counsel or pleader is entitled to appear and act on behalf of the prosecution in the Criminal Courts.	
IN THE MATTER OF CHANDI CHARAN CHATTERJEE v. CHANDRA KUMAR GHOSE ...	App. 70
CHAPTER XI— <i>Complaint, Irregularity in recording—Power of the Court of Session.</i>] A Court of Session is competent to proceed to the trial of a prisoner brought before it upon a charge by a Magistrate authorized to make a commitment, though the complaint or authorization be contained only in a letter from the Judge of that Court to the Magistrate of the district, sent with the record of the case, notwithstanding an irregularity or defect of form in recording the complaint.	
The complaint or authorization of Court before which, or against the authority of which, an offence mentioned in Chap. XI	

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of the Code of Criminal Procedure is alleged to have been committed, is a sufficient warrant for commencement of criminal proceedings.	
THE QUEEN v. NARAYAN NAIK	660
CRIMINAL PROCEDURE CODE, s 36— <i>Removal of a Case by the Magistrate from the File of a Subordinate Magistrate.</i>] Interference by the High Court, in a case where the Magistrate had improperly exercised his discretion in removing a case from the file of a Deputy Magistrate.	
IN THE MATTER OF THE PETITION OF NABA KUMAR BANERJEE	App. 45
... s. 62— <i>Prohibitory Order.</i>] Under section 62 of the Code of Criminal Procedure, a Magistrate cannot pass a prohibitory order without having previously issued a rule to show cause why the order should not be passed.	
THE QUEEN v. RAI LACHMIPAT SING	App. 81
... ss. 63, 77	274
See MAGISTRATE.	
... s. 171	100
See CONTEMPT OF COURT.	
... s. 320	App. 63
See HIGHWAY.	
... ss. 407, 426.] A. was charged with the offence of voluntarily causing hurt to C., and B. was charged with the same offence, and also with the offence of abetting A. The Magistrate found A. guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found B. guilty of abetment of the offence of voluntarily causing hurt to C., and sentenced him to one month's rigorous imprisonment and a fine.	
On appeal, the Sessions Judge held that there was no evidence to convict A., and he accordingly released the prisoner. The appeal of B., however, was rejected, on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt, and therefore, under section 426 of the Code of Criminal Procedure, the sentence could not be reversed. No "error or defect either in the charge or in the proceedings on trial" was alleged.	
Held (by MITTER, J.) that section 426 of the Code of Criminal Procedure did not apply.	
THE QUEEN v. MAHENDRONATH CHATTERJEE	App. 39
... (Act VIII of 1869), s. 435— <i>Power of a Magistrate in dealing with a case when dismissed without full and sufficient enquiry.</i>] <i>Semble.</i> —When a charge is dismissed by a Subordinate Magistrate without enquiry, a Magistrate has no power, under section 435 of Act VIII of 1869, to order a trial before another Magistrate, but can only order a commitment to the Court of Session.	
THE QUEEN v. HIRALAL SING	App. 43
... (Act VIII of 1869), ss. 445A, 445C— <i>Deputy Commissioner—Appeal.</i>] The right of appeal to the High Court given by section 445C, of the Criminal Procedure Code to persons convicted on a trial held by an officer invested with the power described in section 445A, is confined to cases in which the officer has exercised that power.	
THE QUEEN v. DHORA BHOOYA	659

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<i>See</i> BENAMI PURCHASE.	
—, ALTERATION OF— <i>Lower Court.</i>] After a decree has been confirmed by the High Court on appeal, the Subordinate Court has no power to make any alteration in it. P. T. ONRAET v. SANKAR DUTT SING. ...	App. 60
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DEPOSIT— <i>Act XIV of 1859, s. 1, cl. 15—Cause of Action.</i>] The plaintiff, on leaving Calcutta, in 1850, deposited a sum of money with A., B., and C., on which they were to pay him Rs. 9 monthly, and return the principal on his demanding it. Rs. 9 were paid to him monthly until within twelve months of this suit. A. and B. had died since the date of the deposit. This suit was brought against C. and the representatives of A. and B. to recover the amount deposited, and a decree was passed against C. on his own admission. But the representatives of A. and B. set up that the suit was barred. <i>Held</i> , that it was not a deposit under section 1, clause 15 of Act XIV of 1859. But <i>held</i> also, in accordance with the English cases (from which, however, the learned Judge dissented) that the cause of action arose from the date of the agreement to repay the money on demand, and not from the date of the demand, and therefore the suit was barred.	
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DILUVIATION OF LAND— <i>Rights of Proprietors to Accretion.</i>] Where property is wholly submerged by a river, any land forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor.	
FELIX LÓPEZ v. MADDAN THAKOOR, BELJOMOHAN THAKOOR, AND HARI MOHAN THAKOOR	521
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DISTRESS— <i>Vesting Order, Time of Operation of—Priority of Official Assignee.</i>] A distress levied after the filing of the petition of insolvency, but before the vesting order is drawn up, is invalid as against the Official Assignee.	
A vesting order is made when it is given by the Court, and not at the time it is drawn up, signed, and sealed.	
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—, ADMISSION IN ANOTHER SUIT WHEN	529
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—, RECEPTION OF, IN APPELLATE COURT, App. 54	
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<i>See</i> ACT XIV OF 1859, s. 20.	
— <i>Attachment—Partnership—Property—Act VIII of 1859,</i>	
<i>s. 205.] A decree-holder, who was also a partner of the judgment-</i>	
<i>debtor, sought to attach, in execution of his decree, the share of</i>	
<i>the judgment-debtor in the assets of the partnership business, the</i>	
<i>business then being in the hands of the Receiver of the Court under</i>	
<i>a decree for dissolution and winding up. Held, that such share of</i>	
<i>the judgment-debtor was not property within the meaning of section</i>	
<i>205 of Act VIII of 1859, and therefore not liable to attachment</i>	
<i>in execution.</i>	
ABBOTT v. ABBOTT AND CRUMP	382
— <i>Act VIII of 1859, ss. 233, 234.]</i>	
A decree-holder in execution attached and seized certain pro-	
perty which belonged to the judgment-debtor in partnership with	
another person, who alone at the time of attachment was in actual	

possession. *Held*, that such property was the subject of attachment in execution of the decree against the one partner, but such attachment must be limited to his share, and the attachment should be by prohibitory order, not by actual manual seizure.

THAMA SING *v.* KALIDAS ROY ... 386

EXECUTION—Attachment and Sale of Moveable Property—Decree-holder, Liability of, to Owner of Property wrongly seized and sold by him.] In execution of a decree against a judgment-debtor, his right, title, and interest in an elephant was sold. In a suit by a third party against the decree-holder and the purchaser for recovery of the elephant or its value, on the ground that the elephant was his property, and not the property of the judgment-debtor,—

Held, that the decree-holder, as well as the purchaser, was liable to make good the loss caused by such sale.

KANAI PRASAD BOSE *v.* HIRACHAND MANU ... App. 71

OF DECREE—Limitation—Purchase of Decree in Execution—Act XIV of 1859, s. 20.] G. A. obtained a decree against M. Afterwards L. N., who had obtained a decree against G. A., attached the decree which he (G. A.) had obtained against M., and, upon sale in execution, became himself the purchaser of that decree. It afterwards appeared that the decree held by L. N. against G. A. was barred by limitation.

Held, that the execution of L. N.'s decree against G. A. being barred by lapse of time at the time of sale, the sale was invalid.

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<i>See</i> HINDU LAW.	
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<i>See</i> HINDU LAW.	
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<i>See</i> HINDU LAW.	
——, CONSTRUCTION OF—<i>Absolute Gift—Petition to Collector for Mutation of Names.</i>] A., a Hindu, living under the Mitakshara law, executed a petition to the Collector, stating that he was in possession of all his ancestral property; that his only son was dead; that he had no wife; that his son had left a widow, B., and two daughters, and no other children or heirs; the petitioner went on to state, "I declare her (B.) my heir; and as with the exception of the said B., I have no other heir or <i>malik</i>, nor can there be any, of which circumstances I have already preferred information in my petition of 18th April 1830, and life is uncertain, I consequently request that the name of B., the widow of my late son, be registered in the Collectory mutation book as proprietor and malguzar in the place of my name, with regard to the property," &c. "Further, as of B., there are two daughters who, after marriage, by the blessings of Providence, may be blessed with children; they and their children, therefore, are and will be heirs and <i>maliks</i>. But as long as I live, I shall keep the management of my own affairs in my own hands and look after all the transactions of <i>dihat</i>, &c., myself, as heretofore." B. sold and conveyed parcels of the property. In a suit by her daughter's son against the purchasers, for a declaration of his reversionary right to the property sold, <i>held</i>, that, under the terms of the petition, there was an absolute gift to B. That as the gift was not fettered by any restriction, the alienation by B. was good and valid.	
CHATTER LAL SING <i>v.</i> SHEWUKRAM, <i>alias</i> RAI DURGA PRASAD	123
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<i>See</i> ACT XI OF 1865, s. 19.	
GUARANTEE—<i>Statute of Frauds</i> (29 Car. II.), c. 3, s. 4—21 Geo. III., c. 70, s. 17.] A contract of guarantee is a "matter of contract and dealing" within the terms of section 17 of 21 Geo. III., c. 70,	

- and therefore such a contract made by a Hindu is not affected by section 4 of the Statute of Frauds. When a defendant raises a claim of set-off, on the trial of that issue, he must be considered as plaintiff.
- SRIMATI JAGADAMBA DASJ *v.* J. M. GROB ... 639
- HABEAS CORPUS—*Minor—Discretion—Return—Affidavit—Amendment.*] The return to a writ of *habeas corpus* must be taken to be true, and cannot be controverted by affidavit. In England, 56 George III, c. 100, s. 4, allows affidavits to be used to controvert the return in criminal matters, but that Statute does not apply to this country.
- The return to a writ of *habeas corpus* can, however, be amended.
- A girl, under sixteen years of age, has not such a discretion as enables her, by giving her consent, to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian; but where the return to the writ of *habeas corpus* stated that a girl was above the age of sixteen (though her mother stated her to be of the age of thirteen years and nine months), the Court held that she was of years of discretion to choose for herself under whose protection she would remain.
- THE QUEEN *v.* VAUGHAN. IN THE MATTER OF S. M. GANESH SUNDARI DEBI, *alias* MANI ... 418
- Return, Contradiction of—Mahomedan Law—Marriage—Custody of Wife—Minor.*] The return to a writ of *habeas corpus* is not necessarily conclusive, and does not preclude enquiry into the truth of the matters alleged therein, although 56 George III., c. 100, does not apply to this country.
- By Mahomedan law the mother is entitled to the custody of a female child, although married, until she has attained puberty.
- Where a husband applied that his wife, stated in the return to a writ of *habeas corpus* to be “an infant under the age of sixteen years, to wit, of the age of eleven years or thereabouts,” might be delivered over into his custody, the Court, on the ground that she had not attained the age of puberty, and that her dower had not been paid, refused to order her to be taken from the custody of the mother, although the mother had taken her away secretly, in the absence of her father and husband from Bandari, where they were all living together, to Calcutta.
- IN THE MATTER OF KHATIFA BIBI, ... 557
- HEIR ... 15
- See HINDU LAW.
- HEIRS OF ENDOWER, REVERSION TO ... 181
- See HINDU LAW.
- , REVERSIONARY ... 508
- See HINDU WIDOW.
- HIGH COURT, INTERFERENCE BY IN CASE COGNIZABLE BY SMALL CAUSE COURT ... App. 91
- See JURISDICTION.
- , POWER OF ... 76, 316
- See APPEAL TO PRIVY COUNCIL, See STATUTE 24 AND 25 VICT., c. 104, s. 15.
- See STATUTE 24 AND 25 VICT., c. 104, s. 15. ... App. 29
- HIGH WAY—*Criminal Procedure Code (Act XXV of 1861), s. 320—Civil Court Jurisdiction.*] The Magistrate had, on the complaint of the defendant, passed an order, under section 320 of the

Criminal Procedure Code, forbidding the plaintiff to retain possession of a piece of land to the exclusion of the public, until he had obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff, accordingly, brought his suit in the Moonsiff's Court to recover possession of the land. The Moonsiff gave him a decree for exclusive possession of the land. On appeal, the Judge held that the Moonsiff had no jurisdiction to try the question whether the public had a right of way over the land. The Judge's decision was reversed in special appeal, and the case remanded to the Judge to try the issue, whether the plaintiff was entitled to the exclusive use of the land.

MAHESCHANDRA MOOKERJEE v. RAMUTAM PALIT App 68
HINDU AGE OF MAJORITY. See MAJORITY, AGE OF, OF HINDUS.
— DEFENDANT ... 643

See STATUTE OF FRAUDS.

— FAMILY, MANAGER OF JOINT ... 546
See ACT I OF 1845, s. 21.

— IDOL. See SHEBAIT OF HINDU IDOL,

— LAW ... 585
See LIMITATION.

Gift—Religious Endowment—Trustee with Power of Appointment—Deed of Endowment—Failure to appoint new Trustee—Reversion to the Heirs of the Endower.] A., a Hindu, by a deed of *wukfnama* (deed of endowment), after reciting that he had "erected and prepared a *thakurbhari* (temple) and the image of *thakur* (idol), and also a *sadavart* (alms-house), and had, in way of *wukf* (endowed property), dedicated certain property for the performance of the *pūja* (worship) of the said *thakur* and repairing of the house, flower garden and *thakubari*, and appointed his sister, B., the manager and *matwali* (trustee) of the same, authorized B. to spend the profits in the performance of the *pūja*, &c. As for the future, she (B.) should appoint such person to be the manager and *matwali* as may be found by her to be fit, &c.; and in like manner all successive *matwalis* should have right of appointing successively *matwalis*. To these his heirs should not have right to prefer any claim, &c." B. died without having appointed any *matwali* (trustee) to succeed her in the management of the trust. On a suit by the heir of B. to obtain possession of the property covered by the deed against the heirs of A., held that the managership, on failure of appointment of a trustee, reverted to the heirs of the person who endowed the property.

MUSSAMUT JAI BANSI KUNWAR v. CHATTER DHARI SING ... 181

Heir—Paternal Uncle's Daughter's Son—Sapinda.] A father's brother's daughter's son is entitled to be recognized as an heir according to the Hindu law current in the Bengal School.

GURU GOBIND SHAHA MANDAL v. ANAND LAL GHOSE
MAZUMDAR ... 15

Inheritance—Mitakshara—Great-grandson—Sapinda—Gentile—Bandhu—Cognate—Father's Sister's Son.] The great-grandson of the great-great-great-grandfather of the deceased is according to the Mitakshara, a nearer heir to the deceased than his father's sister's son.

THAKUR JIBNATH SING v. THE COURT OF WARDS; THE
COURT OF WARDS v. THAKUR JIBNATH SING ... 442

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- HINDU LAW—Inheritance—Sister.]** A sister cannot succeed her brother as heir by Hindu law.
- SRIMATI RUKKINI DASÍ v. KADARNATH GHOSE** ... App. 87
-
- Karta—Managing Member—Liability of a Managing Member to Account.]** A managing member of a joint Hindu family is bound to render an account of his management to his co-sharers, and he is liable to a suit if he refuses to do so. And such suit will lie even if the parties suing were minors during the period for which the account is asked.
- ABHAYCHANDRA ROY CHOWDHRY v. PYARIMOHAN GUHO** ... 347
-
- Part of Money borrowed paid in Relief of Legal Necessity—Mortgage Deed.]** The daughter of a Hindu, while in possession of the paternal estate, borrowed a large sum of money under a mortgage of a portion of the estate. Part only of the money borrowed was devoted by her to the relief of legal necessity. After her death, the next heir sued the mortgagee to recover the property mortgaged, and to set aside the mortgage deed. The Courts below gave a decree for possession to the plaintiff, upon repayment of the amount actually spent in the relief of legal necessity. Such decree upheld on appeal.
- LALIT PANDAY v. SRIDHAR DEO NARAYAN SING** ... 176
-
- Succession of Gentiles according to Mitakshara.]** According to the Mitakshara, the great-great-grandson of the great-great-grandfather of the deceased is entitled to succession as one of the gentiles.
- BHYA RAM SING AND BHYA JUBRAJ v. AGAR SING** ... 293
-
- Widow—Unchastity—Act XXI of 1850.]** A Hindu widow, in whom the property of her husband has once vested, does not forfeit by her unchastity her right to such property.
- Semble.*—Unchastity, followed by degradation or expulsion from caste, would not be sufficient to deprive a widow of an estate which she has taken by inheritance.
- SRIMATI MATANGINI DEBÍ v. SRIMATI JAYKALÍ DEBÍ** ... 466
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- Adoption.]** A Hindu widow, who has become unchaste, is living in concubinage, and is in a state of pregnancy resulting from such concubinage, is incompetent to receive a son in adoption.
- SAYAMALAL DUTT v. SAUDAMINI DASÍ** ... 362
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- WIDOW—Reversionary Heirs—Declaratory Suit—Act VIII of 1859, s. 15—Necessity—Waste.]** A Hindu died in 1808, leaving five sons, and possessed of considerable property. In 1813, the four younger sons obtained a decree for partition against their elder brother, but themselves continued to live together as a joint Hindu family, and so did their widows after their death. After the death of the widow of one of the brothers, J. D., the widow of another brother, brought her suit for partition; but subsequently, by the consent of all parties, the matters in dispute were referred to arbitration, and an award was made as follows:—"Selling their (the widows') respective ryoti land, 'bati,' or house, they will pay the costs of their respective vakeels; in that way the land, 'bati,' or house, that shall remain, with the proceeds belonging to their respective shares, the raiment and food of O. D. (the widow of another brother) and J. D. will be supplied during their lives; they will be unable to make a gift, sale, &c.; should the proceeds of the land, 'bati,' or house not be sufficient for their food and raiment, and for the purity of their respective husbands in a suitable manner, the *jetta dharma*, then showing good reason,

"regulation, conformably to the *dharma shastra* what is expedient "as necessary, according to usage, informing the other shareholders, "they shall be able to sell the ryoti land 'bati,' or house of their "respective shares." This award, which directed a partition, according to the terms of a *chinitnama*, or written description of the land, which was executed by all the parties, was made a rule of Court on 26th July 1858. J. D. took possession of her husband's share of the estate, some portion of which she alienated. In a suit brought by the reversionary heirs against J. D., and the purchasers of what she had sold, it was alleged that the alienations were without necessity, and contrary to the award, and it was prayed that they might be declared void as against the reversionary heirs, and that J. D. might be restrained from further alienation. *Held*, that the suit could be maintained in the life-time of J. D. As there was no waste proved, the prayer for an injunction to restrain further alienation was refused.

Semble.—In purchasing from a Hindu widow, the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required.

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<i>See HINDU LAW.</i>		

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<i>See ACT VIII OF 1859. ss. 92, 96. See Co-PROPRIETOR.</i>		

TO STAY SALE. <i>See INTERIM INJUNCTION.</i>	...	
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COURT, APPEAL FROM COMMISSIONER OF,	179
<i>See STATUTE 11 AND 12 VICT., c. 21, s. 73.</i>	

INSTALMENT-BOND — "Nuzzur" — "Salami" — *Abwab* — *Unregistered Potta and Kabuliat—Set-off—Evidence.*] Plaintiff sued in a Small Cause Court, on an instalment-bond, for rupees 81. The bond had been executed for *nuzzur* or *salami* contemporaneously with the execution of a *potta* and *kabuliat*, by which the defendants agreed to pay the plaintiff rupees 335 a year, for two years, as rent for certain land. The *potta* and *kabuliat* had not been registered. A previous suit brought by the plaintiff under Act X of 1859 had

been, therefore, dismissed, and no oral evidence was admitted to prove the terms of the potta and kabuliat. The defendants now claimed a set-off against the amount claimed under the bond, on the footing of a contract contained in the potta and kabuliat. The Judge refused to receive them in evidence, or to receive oral evidence of their contents, and gave a decree in favor of the plaintiff, subject to the opinion of the High Court on four questions submitted by him.

Held, the suit on the bond was properly cognisable by the Small Cause Court as a simple debt due under the bond. It was clearly not for an *abwab* or illegal cess; whether it was *nuzzur* or *salami* was immaterial. The defendant having benefited in the Act X suit by the fact that no oral evidence had been admitted to prove the contents of the potta and kabuliat, it would have been contrary to rule and inequitable to admit such evidence now in support of his claim of set-off.

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<i>See</i> JURISDICTION.			
INTERIM INJUNCTION TO STAY SALE.] The plaintiffs, who were in possession of certain premises, brought a suit to restrain the defendant from selling a share in them which he had attached in execution of a decree upon a mortgage to him of that share, and to set aside the deed of mortgage. According to the plaintiffs' case, they (the plaintiffs) were in possession under a decree of Court obtained upon a mortgage executed to them by the executor of the will of the last proprietor under a power contained in the will; and the mortgagors to the defendant, who were the brother and the son of the testator, had no interest in the property at the time of their mortgage to the defendant. The plaintiffs applied for an <i>ad interim</i> injunction, and the Court granted the application.			
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----- NOT AFFECTING MERITS OF CASE	...	...	371
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<i>See</i> SANAD, RENT-FREE.	
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<i>See</i> ACT I OF 1845, s. 21.	
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<i>See</i> HIGHWAY.	
----- OF REVENUE COURT. <i>See</i> REVENUE COURT.	
<i>Special Appeal—Interference by the High Court</i>	
<i>in a Case cognizable by the Small Cause Court—Act XXIII of</i>	
<i>1861, s. 13.] In a suit cognizable by the Small Cause Court, and</i>	
<i>in which no special appeal lies to the High Court under section</i>	
<i>13, Act XXIII of 1861, the High Court exercised their extraordi-</i>	
<i>nary powers, and dismissed the suit.</i>	
MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR v. SHAGOR	
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LANDLORD AND TENANT	234
<i>See</i> REVENUE COURT.	

Storage of Goods—Warehouse—
Godown—Floor of Upper Story—Negligence.] The plaintiff let
to the defendants a godown, on an upper story over his own
godown, for the purpose of storing goods, the only stipulation in
writing being that no combustible or hazardous goods should be
stored there. The plaint alleged that the premises were taken by
the defendants, on the understanding that the defendants should
use the same in a tenant-like manner, yet the defendants used them in
an untenant-like manner, and loaded an unreasonable and improper
weight on the floor, whereby it broke through, and damaged the
plaintiff's goods below. The evidence showed that the godown had
been used by former tenants for storing light goods, but, in addition
to light goods, the defendants had at the time the floor broke stored
upon it several casks of white and red lead, and some cases contain-
ing tin plates. The evidence of professional witnesses showed
that a warehouse floor ought to be able to bear 1½ cwt. per super-
ficial foot, and there was evidence to show that the pressure on the
portion of the floor which fell was at the time 1 cwt. 1 qr. 6 lbs.
The floor gave way in the part where the heavy goods were stored,
but there was nothing to show that they were improperly stored.
Evidence was given that it was not usual to store heavy goods on
an upper floor, but that heavy goods were sometime stored on
upper floors. The evidence of the professional witnesses was to
the effect that the floor was not a proper one upon which to store
merchandise, but that 1½ cwt. was not a dangerous weight for a
warehouse floor to bear, and that no unprofessional person could
have anticipated danger from it in the present instance. There was

also evidence to show that the girders were not sufficient for the floor of an upper story to be used as a godown. In a suit for damage sustained by the plaintiff by reason of the breaking of the floor,—

Held (per MACPHERSON, J., and on appeal), that it lay upon the plaintiff to show that the defendants had acted in an improper and untenant-like manner, and that he had failed to show that any improper or unreasonable weight had been placed by the defendant upon the floor, or such as a tenant exercising ordinary caution might not have placed there.

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<i>See</i> ACT VIII OF 1859, ss. 92, 96. <i>See</i> ACT III OF 1864, (B. C.), s. 87. <i>See</i> RIGHT ON WAY.					
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<i>See</i> EXECUTION OF DECREE. <i>See</i> MAHOMEDAN LAW. <i>See</i> ACT XIV OF 1859, ss. 20, 22. <i>See</i> MUTUAL DEALINGS. <i>See</i> ACT XIV OF 1859. <i>See</i> SALE OF GOODS.					

Adverse Possession—Hindu Law—Alienation by Life-Tenant—Suit by Reversioners—Arguments on Appeal and Review.]

A daughter succeeded to a share of her father's estate, and transferred it in full property, by a formal instrument or ikrarnama dated March 1849, to her grand-daughter, expressly naming her, and treating her as her heiress: the transfer being in the nature of a release, reserving maintenance and other advantages to the donor.

Upon the application of the grand-daughter before the Collector, for the mutation of names according to the terms of the ikrarnama, the reversioners (collateral heirs of the father) affected to contest the unauthorised nature of the alienation, but dropped their opposition. In 1857, the diaras, or alluvial lands attached to the estate, were perpetually settled with the grand-daughter.

The alienor quarrelled with her grand-daughter, and in 1857 brought a suit against her to set aside the ikrarnama, upon the ground of the non-performance of a condition subsequent. The plaintiff succeeded in the first Court, but the judgment was reversed (October 1858) on appeal to the Zilla Judge. Pending the appeal, the

plaintiff died (February 1858), and the reversioners applied to be, and were, admitted as her heirs, to conduct the appeal.

The grand-daughter remained in possession from the date of transfer until 1866 when she died.

In April 1867 the present suit was brought by the surviving reversioner, who claimed to be entitled to recover possession of the property by right of inheritance from the alienor's father. He was one of the reversioners who had been admitted to conduct the appeal in the former suit upon the death of the alienor.

Held (on special appeal and review) there had been no adverse possession; the instrument enured as a transfer of the donor's life-interest only; the judgment in the former suit brought to set it aside, did not bind or affect the reversioners, who, in that suit, merely represented the interest of their predecessor the life-tenant.

In the first Court an issue was raised whether or no the hearing of this suit was barred by the Law of Limitation. One of the grounds of appeal to the Judge was that the principal Sudder Ameen ought to have held the suit barred as regards the diaras under the special limitation of three years from the date of the Collector's settlement. The Judge did not notice this ground in his judgment. The same ground of appeal was repeated in the special appeal to the High Court, but that Court refused to entertain it for the reason that it did not appear to have been raised in argument before the Judge, or in the first Court. On application for review, it was urged that the Court ought to have listened to this ground, but the Court adhered to its former decision.

Counsel should not be heard to re-argue a case on review upon the same points as were argued in special appeal.

MUSSAMAT RAJ KUNWAR *alias* SHEOMURAT KUNWAR *v.* MUSSAMAT INDERJIT KUNWAR ... 585
LIMITATION—Meane Profits—Cause of Action.] The cause of action, in respect to meane profits, accrues on the date on which, but for the fact of dispossession, the plaintiff would have been entitled to receive them.

LAKHI KANT DAS CHOWDHRY *v.* RAM DYAL DAS ... App. 61
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See DECREE, ALTERATION OF.
 ———, **OBJECTION NOT TAKEN IN** ... App. 62

See SPECIAL APPEAL.
MAGISTRATE—Arrest—Warrant—Complaint—Remand—Commitment—Bail—Criminal Procedure Code (Acts XXV of 1861 and VIII of 1869), ss. 68, 77.] Section 68 of the Criminal Procedure Code applies only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint. That section is intended for the purpose of enabling a Magistrate to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases the jurisdiction to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge must be either personal or derived from testimony legally given. The report of the Police, or any statement which falls short of an actual formal complaint, or of a statement made on oath, is not sufficient in law to give a Magistrate jurisdiction to issue his warrant.

Under section 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent Police officers, and unless the urgency is imminent.

The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate, and the prisoner cannot lawfully be committed to prison, or remanded without sufficient grounds; and in the absence of evidence, there can be no grounds.

In this case, although the Magistrate had acted illegally before evidence was recorded, and had shown a want of discretion in some of the stages, the High Court refused to quash the Magistrate's order, directing the prisoners to be put upon their defence, on the ground that the order had been made by a competent officer after hearing evidence, which was judicially received and recorded.

IN THE MATTER OF THE PETITION OF SURENDRA NATH ROY. THE QUEEN v. SURENDRA NATH ROY ...	274
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MAHQMEDAN LAW ...	557
See HABEAS CORPUS.	

Dower—Prompt Dower—Deferred Dower—
Limitation—Act XIV of 1859, s. 1, cl. 9.] A Mussulman, on his marriage, entered into a written agreement (unregistered) with his wife to pay her a lakh of rupees, one-fourth as prompt (*mooûj-jul*) dower, the remainder as referred (*moowujjul*) dower. A separation occurred between the husband and wife, but there was no divorce. During the separation, on 3rd May 1861, the wife petitioned for leave to sue as a pauper to recover the balance of her prompt dower. The husband, on the 1st July 1861, filed a petition denying her claim against him. The wife's application to sue as a pauper was rejected on 27th January 1862. The husband died on 30th August 1867. On the 13th May 1869, the widow brought her suit to recover the balance of prompt dower and the whole of the deferred dower. *Held*, that she could only recover the latter. The cause of action in respect of deferred dower could not arise until the husband's death. But the cause of action, in respect of prompt dower, arises upon demand by the wife, and refusal by the husband. In this case there was a demand by the wife, and a refusal by the husband, viz., in their petitions of 3rd May and 1st July 1861, respectively, more than three years before suit, therefore the claim to prompt dower was barred by clause 9, section 1 of Act XIV of 1859.

MUSSAMAT RANI KHIJABANNISSA v. RANI BISANNISSA BEGUM ... 84

Usury—Interest, Rate of—Act XXVIII of 1855—Small Cause Court Acts IX of 1850 and XXVI of 1864—Procedure.] The custom of taking interest as between Mahomedans is recognized by the Courts.

The Small Cause Court Acts, IX of 1850 and XXVI of 1864, form one procedure, and the High Court can therefore exercise, in

cases referred under section 55 of Act IX of 1850, the extended powers given to by section 8 of Act XXVI of 1864.

Semle—Per PHEAR, J. (dissenting from *Ramlal Mookerjee v. Haranchunder Dhur*)—Act XXVIII of 1855 repealed the Mahomedan laws relating to usury. By "laws relating to usury," the Legislature meant laws affecting the rate of interest.

MIA KHAN AND MANU KHAN *v.* BIBI BIBIJAN AND BIBI AMNUJAN ... 500

MAJORITY, AGE OF, OF HINDUS—*Act XL of 1858.*] A Hindu, domiciled with his family at Serampore, in the Zilla of Hooghly, died, leaving a will, in which was the following direction:—

"In order to look after the affairs, to conduct suits and manage the debts and dues relative to my real and personal estates, my eldest son, H. C. G., who has attained the age of majority, remains executor, for my younger son, G. C. G., is an infant; but as my eldest sister, S. H. D., is prudent and sensible, all the affairs of the estates shall be under her superintendence; and my eldest son shall do all the acts according to her advice and direction. But when my younger son G. C. G., will then come of age, both the brothers shall be competent personally to manage the affairs; at that time the advice and superintendence of my said sister shall not remain."

G. C. G., after attaining the age of 16, but before he had reached the age of 18, applied for grant of probate of his father's will to himself, jointly with his brother H. C. G., in respect of property in Calcutta. *Held*, that he had not attained the age contemplated in his father's will at which he was to be joined in the executorship with his brother.

IN THE GOODS OF GANGA PRASAD GOSAIN ... 80
MANAGER OF JOINT HINDU FAMILY ... 546

See ACT I of 1845, s. 21.

MANAGING MEMBER ... 347
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MERITS OF THE CASE, IRREGULARITY NOT AFFECTING ... 371
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MITAKSHARA ... 442
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Sale of Ancestral Property—Cause of Action.]

According to the Mitakshara, a son has a right during the life-time of his father to sue to set aside alienations of ancestral property made without his consent. His cause of action arises from the date when possession is taken by the purchaser.

AGHORI RAMASARG SING, *alias* DAU JHI, *v.* J. COCHRANE, App. 14

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SMALL CAUSE COURT ACT	App. 57
<i>See ACT XI OF 1865, s. 21.</i>	
MOKURRARI ISTEMRARI POTTA— <i>Perpetual Lease—Regulation XIV of 1812.</i>] A zemindar in the District of Cuttack granted the following lease:—	
“In the chawd-nak 1236 Amli, 17th day of the month of Brisa, “Sri Hari Chuckerbutty grants to Nared Manti this istemrari “(permanent) potta. For that I execute istemrari potta of my “Khardigi Ayma in Mauza Bhimpur, Jote land measuring four “bigas, being previously to this in our occupation, you will cultivate and cause to be cultivated hereafter. Mokurrari (fixed) “rent at rupees 8-12 sicca you will pay from year to year. In case “of flood or drought, you will be allowed a reduction of rent “according as such reduction will be allowed to others. To this “Hari Chuckerbutty assents.” A subsequent purchaser of the zemindari right obtained a fresh settlement of the zemindari under Government. The son and grandson of the grantees held successively under the lease.	
In a suit by the zemindar against the holder for enhancement of rent, <i>held</i> , that the potta was a hereditary lease fixing the rent in perpetuity, and that it was binding on the representatives of the grantor.	
KARUNAKAR MAHATI <i>v.</i> NILDABHO CHOWDHRY	652
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<i>See ACT XX OF 1865, s. 34.</i>	
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<i>See REGULATION XVII OF 1806, s. 7.</i>	
<i>Agreement not to alienate.</i>] By an agreement reciting that A. had executed a bond in favor of B., for a certain sum of money, A., “in order to repay the bond-money in the terms in the bond contained,” declared that, “until the repayment of the money covered by the bond, he should not, from the date of the agreement, convey the property mentioned therein to any one, by deed of sale, or deed of conditional sale, or mokurrari potta, or deed of mortgage, or zuripeshgi ticca potta. Should he make all these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid, and as executed in favor of nominal parties for evading payment of the money covered by the said land.”	
<i>Held</i> (MARKBY, J., <i>doubting</i>), that the instrument operated as a mortgage to A. of the lands comprised therein.	
No precise form is required to create a mortgage.	
RAJKUMAR RAMGOPAL NARAYAN SING <i>v.</i> RAM DUTT CHOWDHRY	462

MORTGAGE—Equity of Redemption, Purchase of—Tacking—Mofussil. In 1840, A. mortgaged certain lands to B., which he had granted in patni at a rent of rupees 145. Subsequently in September 1844, A. granted a fresh patni at a reduced rent of rupees 90; and on the 9th October 1844, A. mortgaged the same lands to C. In 1856, C. obtained a decree for the redemption of the mortgage to B., and he paid off the debt to B.: but it did not appear that he took an assignment of the mortgage for the purpose of keeping it on foot as a security against incumbrances created by A. Subsequently to the date of that mortgage, and prior to that of the mortgage to himself; and in 1862, he obtained a final decree for foreclosure against A. In a suit by C. to set aside the lease of September 1844 held that it was valid and binding upon him.

Sembla.—The English principle of tacking does not apply to mortgages of land in the mofussil.

GAUR NARAYAN MAZUMDAR v. BRAJA NATH KUNDU CHOWDHRY ... 463

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See EXECUTION.

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See ACT VIII of 1859, s. 233

Act X of 1859, ss. 86, 99—Act VI of 1862 (B. C.), s. 17—Act VIII of 1859 ss. 236, 265—*Execution of Decree for Rent—Collector, Sale by.*] A. obtained a decree against B., for arrears of rent. C. was an under-tenant of B., under an ijara lease. In executing A.'s decree against B., the Collector sold the "rights and profits of the debts due for rent" from C. to B., for the year 1273-4-5.

A. became the purchaser, in a suit brought by D., as assignee of A., of rents alleged to be due for the years 1273-4-5.

Held that, for the purpose of Act X of 1859, rent is moveable property; and that the Collector, therefore, was competent to effect the sale to A.

MAHES CHANDRA CHATTAPADHYA v. GURUPRESAD ROY ... 155

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See ACT III of 1864 (B. C.), s. 87.

MUTATION OF NAMES, PETITION TO COLLECTOR FOR 123

See GIFT.

MUTUAL DEALINGS—Act XIV of 1859, s. 8.—Limitation—Year—Account, Balances of. The defendant in 1865 and 1866 indented on the plaintiffs for large quantities of merchandize, which was shipped to Calcutta from time to time by the plaintiffs' agents in London, who drew bills on the defendant for each shipment, forwarding such bills and the shipping documents to the plaintiffs, in Calcutta. The bills were presented to the defendant by the plaintiffs, and accepted by them. In the course of the transactions,

several of the acceptances were dishonoured by the defendant, and the plaintiffs at his request allowed him to renew the bills. Some renewals took place in August and September 1866. In March, May, and July 1866 the defendant made purchases from the plaintiffs, and the plaintiffs made purchases from the defendant. The plaintiffs were in the habit of closing their accounts on 30th June in each year. In an action for balance of account brought on 24th February 1870, *held* that the parties were merchants and traders having mutual dealings under section 8 of Act XIV of 1859. The year mentioned in section 8 of Act XIV of 1859 is intended to be reckoned from the time when the balance of accounts is struck. In this case that was the 30th June 1867; the suit therefore was not barred.

Quære.—What would be the operation of the section in those cases in which the merchant or trader balances his accounts at the lapse of a period of less than one year?

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<i>See</i> SPECIAL APPEAL.				

OFFICIAL ASSIGNEE—Vesting Order—Sale in Execution of Decree—Auction-purchaser—Priority—Act XXIII of 1861, s. 15—Act VIII of 1859, ss. 221, 232, 240, 242, 351—Insolvent Act (11 & 12 Vict. c. 21), ss. 7, 49.] In September 1867, A. obtained a decree against B.; and on 12th January 1868, caused a piece of land to be attached in execution. On 17th April 1868, it was sold by order of the Zilla Judge, and bought by C. Before this, however, the judgment-debtor B. had filed his petition in the Insolvent Court; and on the 6th March 1868, a vesting order was made. On 24th July 1868, the Official Assignee sold the premises by the order of the Insolvent Court.

The purchaser at the last mentioned sale now sued to recover the property from the purchaser at the sale in execution of A.'s decree.

Held, per COUCH C. J., BAYLEY, KEMP, and JACKSON, JJ., that the vesting order passed the property to the Official Assignee, subject to being divested by a sale in execution of the decree; that the sale in execution by order of the Zilla Judge was legal, notwithstanding the vesting order; that the purchaser at the sale in execution of the decree acquired a good title to the property, and

the purchaser at the sale by order of the Insolvent Court had no right to recover it from him. The attaching creditor had a right to have the attached property sold, and the money realized by the sale paid to him.

Per PHÉAR, J.—The jurisdiction of the Zilla Judge to order the sale was not affected by the vesting order; but before making the order for sale, the Official Assignee should be heard; and unless special reason be shown, upon the Official Assignee's application, the execution proceedings should be stayed or set aside. In the present case it must be assumed that the Judges made the order for sale in due course, and, consequently, that sale operated to pass the property out of the hands of the Official Assignee into those of the auction-purchaser.

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<i>See STATUTE, 24 & 25 VICT., c. 104, s. 15</i>			

PARDANASHIN—*Suit to close Windows.*] The defendants having opened certain windows, and erected a verandah in their house, which commanded a view of the plaintiffs' female apartments, the plaintiffs brought a suit against them to have the windows closed, and the verandah removed.

Held, that no such suit was maintainable.

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PARTIES—*Act VIII of 1859, ss. 73, 350—Act XXVII of 1860, s. 4—Adding Parties—Irregularity in an Interlocutory Order not affecting Merits of the Case—Certificate of Administration—Suit by Co-heir against Holder of Certificate of Administration—Parties to Suit for Account of an Estate against Holder of Certificate.*] In a suit against a co-heir, who had obtained a certificate under Act XXVII of 1860, for an account of the estate of the deceased proprietor, a third party was added as a defendant, under section 73 of Act VIII of 1859, "it appearing, from the accounts put in, that a large portion of the assets had been disposed of by him as agent" of the holder of the certificate. On appeal, *held*, that a co-heir is entitled to follow property of the deceased into the hands of any person who has misappropriated it, and such right is not taken away by the certificate. Therefore, any person who, with the consent of the holder of the certificate, has improperly possessed himself of property belonging to the deceased, and misappropriated it, may be joined as a co-defendant. The third party was rightly so joined in this case.

The words in section 73 of Act VIII of 1859, "who may be likely to be affected by the result," construed to mean "likely to be affected, if added as parties."

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PARTITION, EXPENSES OF—*Ameen, Remuneration of—Lieutenant-Governor—Board of Revenue—Commissioner—Collector—Regulation XIX of 1814—Act XI of 1838—Act XI of 1859, ss. 5,*

83.] On 12th June 1867, some of the proprietors of an estate applied to the Collector for a partition under Regulation XIX of 1814. On the same day, the Collector issued a notice to all the shareholders including the plaintiff in this suit, calling upon them to come in within one month, and show such cause, and offer such objections, &c., as they should think fit. It did not appear that the plaintiffs did come in or did anything upon this. Similar applications were made by other shareholders. On 19th August 1867, the Collector drew out a tabular statement, purporting to be in pursuance of section 4, Regulation XIX of 1814. In it was a column giving the shares into which the expenses of the partition were to be divided. On the same day, a notice was issued to the proprietors, ordering them to pay their respective quotas of the expenses accordingly. It was said by the defendants that the apportionment was confirmed by the Commissioner on the 20th January 1868. On the 6th March 1868, it was ordered by the Collector that a proclamation should be issued in accordance with paragraph 4 of section 5 of Act XI of 1859, directing the plaintiffs, as defaulters in two sums of rupees 251-3-2 and 9-9-6, to pay the Government revenue. On the 28th March, such proclamation was issued accordingly. Subsequently, one of the plaintiffs, came in, and offered to pay all that was then due and outstanding. His application was rejected; and on the same day, the 8th April, the sale proceeded, and the whole interest of the plaintiffs was sold for rupees 16,900. The plaintiffs appealed to the Commissioner, but their appeal was dismissed. The plaintiffs, therefore, brought a suit against the purchasers and the Collector for recovery of the property and for cancelment of the sale.

Held, that the sale was void. There was no arrear of Government revenue justifying a sale under Acts XI of 1838 and XI of 1859, section 5. There could be no arrear until demand after sanction by the Board of Revenue and by the Lieutenant-Governor of the estimate of expenses prepared by the Collector, and fixed by the Commissioner. The Board must give its sanction in each case, and the defendants failed to show that it had done so. But even if the Commissioner had power to finally determine the amount and date of payment, it was not shewn that he had done so, or supposing that he had, that any fresh demand had been made upon the parties liable.

Per BAYLEY, J.—The completion of the partition is not necessary under Act XI of 1838 before the amount of unpaid expenses can become an arrear realizable by sale.

Semble.—The Government need not give its sanction in each case, but a "general" sanction will be sufficient.

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DISSOLUTION OF—*Adultery of Partner with Wife of Co-partner.*] Adultery of one partner with the wife of his co-partner is a sufficient ground for dissolution of the partnership.

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UNDER s. 15, LETTERS PATENT— <i>Time for presenting the Petition—Practice—Suit for Enhancement of Rent—Act X of 1859, s. 4—Pleading.</i> <i>Per</i> NORMAN and HOBHOUSE, JJ. (BAYLEY, J., dissenting), <i>held</i> that, in the pre- sent case, the defendant had not either in the written statement filed by him or by his statements in examination raised the ques- tion. Whether he was entitled to the benefit of Section 4 of Act X of 1859. <i>Per</i> PEACOCK, C. J., and KEMP and MACPHERSON, JJ.—A petition of appeal, under section 15 of the Letters Patent, from a decision of an Appellate Division Bench, may be presented within thirty days from the time when the written judgments of the Division Bench are put in. The difference of practice on the Original and Appellate Jurisdictions of the High Court contrasted.	
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<i>See</i> STATUTE 24 and 25 VICT., c. 104, s. 15.	
PLAINT— <i>Signature and Verification—Practice.</i> Where the plain- tiffs described themselves as lately carrying on business under the name of C. and Co., <i>held</i> , that there was no irregularity in the plaint being signed by C. and Co., and verified only by A. B., one of the partners.	
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PLEDGE— <i>Possession—Seizure—Interpleader Suit—Costs.</i> A. obtained a decree in the Small Cause Court against B. In exe- cution of the decree, goods belonging to B., but in the possession of a pledgee, were seized by a bailiff of the Small Cause Court. The pledgee brought an interpleader suit under section 88 of	

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Act IX of 1850 to recover the goods. <i>Held</i> , the pledgee was entitled to have the goods released to him, and to have the costs of the suit paid by the execution-creditor.	
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Act VIII of 1859, s. 2— <i>Waiving Objection in Court below, Effect of an Appeal—Form of Decree against Widow in Possession of Estate as Security for Dower.</i>] Where a party has a good objection such as an absence of tender before suit, to urge to	

the prosecution of a suit, his omission to do so in the first instance is fatal to his availing himself of it as an objection on appeal.

Where a woman is in possession of her husband's estate as security for unpaid dower, the proper decree, in a suit against her for possession by the heir, is a decree for possession, subject to the amount due, with a direction for an account as to mesne profits received by her.

A Mahomedan died, leaving, among others, a widow and a sister entitled to shares in his estate. The widow got possession of the whole. The sister died; and after her death, her husband, on behalf of himself and grandson, sued the widow to obtain the shares to which the deceased's sister was entitled, and obtained a decree for payment of the same after satisfaction of the widow's lien for dower, in certain proportions to himself and grandson. The husband's interest in the decree was subsequently confiscated by Government for having taking part with the enemy in the mutiny. He subsequently died, leaving his grandson. The widow died during the mutiny, and her brother was put into possession of the property, by the Government as her heir. The grandson now sued the widow's brother to recover his own and his grandfather's share, alleging that the lien for dower had been satisfied. *Held*, the suit was not barred by Act VIII of 1859, section 2.

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PRACTICE—Execution of Decree made on Appeal—Mesne Profits.]

When the Privy Council declares an appellant entitled to real property of which he was out of possession, and directs the High Court to make the inquiry necessary to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court, on being applied to for execution, ought, besides giving possession, to ascertain and award the mesne profits up to the date of giving possession.

An appeal will lie as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council where the property is over rupees 10,000.

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PRESCRIPTION, RIGHT OF—Permissive Possession.] To constitute a right by prescription, the possession must have been as of right. Mere permissive possession cannot be the basis of right of prescription.

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<i>See ACT VIII OF 1859, s. 355.</i>	
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<i>See ACT VIII OF 1859, s. 17, cl 2.</i>	

REDEMPTION, EQUITY OF—*Purchase by Mortgagee—Mortgagor and Mortgagees—Trustee.* K. D., a Hindu widow, by deed, appointed R. S. to be her general mooktear, for the conduct of certain suits in her name, which were pending in respect of the estate of her deceased husband. By this deed, dated September 25th, 1858, she covenanted to repay him, within two months of the successful termination of the suit, "all moneys properly disbursed by him on her account, &c," and also to pay him an additional sum as remuneration to himself. R. S. entered on the conduct of her business, and advanced certain moneys on her account; and in October 1859, K. D. executed in his favour a second deed by which she mortgaged to him her share in, the estate of R. H., deceased, which was in the hands of his executors, "and my "decrees, 24 and 25, in the Zilla Court, and the decree in the "Supreme Court, and the right and interest of all the said decrees "and all other real and personal properties belonging to the said "estate." By a decree of the High Court of 28th July 1862, in one of the suits brought by K. D., the estate of R. H. was declared to consist of a share of a certain talook, of a share of a house in Calcutta, and of a certain sum of money; and K. D. was declared to be entitled to one moiety thereof. K. D. afterwards obtained an order for possession, and held possession of the said talook until August 1866. R. S. continued the conduct of K. D.'s business and advanced more money on her account, in respect of which, on May 31st, 1865, he brought a suit against her; and on September 21st, 1865, obtained a decree in his favor. Under this decree he attached the right, title, and interest of K. D., in the estate of R. H.; and on 26th June 1866, it was put up for sale, and purchased by R. S. himself. In a suit brought by K. D. against R. S., among other things for an account, *held*, that R. S. was a trustee for K. D., in respect of her share in the estate of R. H., which he had purchased in execution of his decree.

A mortgagee cannot, properly, in execution of a simple decree for money, the repayment of which is secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged; but if he do so, and purchase it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title.

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— FROM SMALL CAUSE COURT— <i>Costs—Act XXVI of 1864, s. 8.</i>] Where a case had been referred from the Small Cause Court, for the opinion of the High Court, at the request of the plaintiffs, and they neither deposited any security for the costs of the reference, nor appeared in the High Court, <i>held</i> the case was not properly before the Court, and an application for costs by the defendant who did appear was therefore refused.	
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— Where a case had been referred from the Small Cause Court, for the opinion of the High Court, at the request of the plaintiffs, and they neither deposited any security for the cost of the reference, nor appeared in the High Court, <i>held</i> , the defendants who appeared were entitled to judgment and to an order that the plaintiffs should pay the costs of reference and other expenses connected therewith.	
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— <i>Act XX of 1866, s. 48—Unregistered Deed of Immoveable Property—Possession—Priority.</i>] Where possession of immoveable property has been given under an unregistered lease, a subsequent grantee of a registered lease cannot maintain a suit to evict the lessee in possession, on the ground of the priority of his deed under section 48, Act XX of 1866.	
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REGULATION—1806—XVII, s. 7— <i>Mortgage—Foreclosure of Equity of Redemption—"Stipulated Period."</i>] By a mortgage in the English form, the defendants conveyed certain property to the plaintiff, subject to the proviso that, in the event of the defendants paying to the plaintiff the principal sum on the 4th September 1868, and in the meantime paying interest on that sum half-yearly, with annual rests, in case of default of such payment, then the plaintiff should re-convey the property. The defendants failed to pay interest; and on the 4th December 1866, the plaintiff applied to the Judge of Chittagong for foreclosure; thereupon notices under section 8 of Regulation XVII of 1806 was issued, and served on the defendants. On the 15th April 1868, this suit was instituted by the plaintiff for the establishment and confirmation of absolute purchase, and to obtain possession of the mortgaged premises.	
— <i>Held</i> , that the suit was not maintainable. Regulation XVII of 1806 applied to this mortgage; and, under that Regulation, the mortgage could not apply for foreclosure, until the time agreed upon for re-payment by the mortgagor,—that is, the "stipulated	

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period" referred to in section 7, and the mortgagee is entitled to one year's grace from notification of the application for foreclosure made after that date.	
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RELIEF—Prayer for General Relief.] Under a prayer for general relief, a plaintiff is not entitled to any relief which is inconsistent with his plaint; therefore, where a plaintiff brought a suit to set aside his father's will, on the ground that he had no power to dispose of his property, but that the plaintiff was entitled as eldest son and heir-at-law according to Hindu law, the suit should have been dismissed with costs, and no account should have been decreed to the plaintiff in respect of his interest in a portion of the property, the bequest of which was, in the opinion of the Court below, void for remoteness.	
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-----, JURISDICTION OF—*Benami Lease—Land-
lord and tenant—Act X of 1859.*] A. brought a suit in the Col-
lector's Court against B., C., D., and E., for arrears of rent in respect
of land demised under a potta to F. He joined G. and H. as defend-
ants. According to the terms of the potta, they were sureties for
F. It was admitted that F.'s name was used *benami* in the potta,
and that he took no interest. A. sued B., C., D., and E., as the
parties interested and in possession. C. objected that a new settle-
ment had been made, and a new potta granted; that he held a
moiety only of the lands, and was not liable for more; and that D.
was his ryot, and ought not, therefore, to have been made a defend-
ant. D. and E. contended that they were liable in respect of the
lot comprised under the potta, and had already paid rent for it to
A. under a decree, but objected that they ought to have been sued
separately from B., and C. B. did not appear. The lower Court
held that C. had failed to make out his case, and that D. and E. were
liable in this suit, and passed a decree, ordering them to pay the
amount admitted by them to be due from them; and the other
defendants to pay the remainder of the claim. C. appealed. On the
appeal, PEACOCK, C. J. (MITTER, J., *contra*), *held*, that the plaintiff's
suit must be dismissed, the lease being to F., and not to the defend-
ants; that the Court below had founded its decision on matters
extraneous to the lease, which it had no jurisdiction to enquire
into. C. appealed under section 15 of the Letters Patent.

Held, by KEMP and JACKSON, JJ., that the Collector had full juris-
diction to entertain the suit, which was properly brought against
those who were in the actual possession of the land, and that these
persons were really the tenants; that the form of the decree passed
by the Collector was correct, the plaintiff having consented to the
decree being given in that form; that the sureties had really made
themselves responsible for those who were really interested under
the lease, and not for F.

Held by NORMAN, J. (*dissenting*), that the terms of the lease
under which F. was alone interested could not be contradicted by
oral evidence; that F. alone was bound to the lessor, under the lease;
that the defendants could not be sued as tenants, unless, subse-
quent to the potta and kabuliati, something had occurred creating
the relation of landlord and tenant between them and the lessor;
that no such relation or any contract creating such relation between
the parties could be implied from the circumstances of the case,
and the suit should be dismissed. The Revenue Court had, there-
fore, no jurisdiction. But whether in the Revenue or Civil Court,
D. and E. could not be sued jointly with B. and C., nor could G.
and H.

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— USER. <i>See</i> USER.	
— WAY— <i>Easement—Limitation—Act XIV of 1859.</i> A right of way over the land of another must be kept up by constant use. After a discontinuance of such use for a period of six years, no suit can be brought to re-establish it. HARIDAS NANDI v. JADUNATH DUTT	App. 66
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Bills of Exchange, Presumption of Payment of—Production of, by Acceptor—Account Sales—Evidence—Limitation—Acknowledgment—Act XIV of 1859, s. 4.] The plaintiffs in London and the defendant in Calcutta had dealings, which consisted in the defendant shipping jute cuttings and rejections to the plaintiffs in certain quantities and within certain limits as to price, the defendant drawing bills on the plaintiffs in respect of such goods, which the plaintiffs accepted. The plaintiffs alleged that there was an agreement between them and the defendant, that in case of shipments in excess of the limits given by the plaintiffs, they should at their option receive the goods on their own account, or treat them as consignments on account of the defendant, but the defendant denied there was any such arrangement. The defendant made several shipments in excess of the plaintiffs' limits, and the plaintiffs treated them as consignments on the defendant's account, selling them on defendant's account and forwarding him account sales, and drawing bills on the defendant for any balance due to them in the transactions, which bills the defendant refused to pay. The plaintiffs forwarded accounts current to the defendant, in which appeared an item of £188-5-6 as the balance of account current down to December 1866. It appeared to have been due, however, in respect of an account for 1863. The defendant sent a letter, dated 22nd December 1865, to the plaintiffs, which contained the following postscript:—"P. S.—Enclosed a remittance of £40 to old account." In an action brought by the plaintiffs for the balance due to them from the defendant in respect of the shipments which had been treated by the plaintiffs as consignments on the defendant's account, the plaintiffs included the sum of £188-5-6. The suit was brought in November 1868. The defendant admitted he had sold the bills and received the money for them; they were produced by the plaintiffs, the acceptors.

Held, that the bills being produced by the acceptors after due date, and the defendant having received no notice of dishonor, and no demand for payment of the bills, the presumption was that they had been paid by the plaintiffs.

In exercising their option of treating shipments in excess of their limits as on their own account, or as consignments on account of the defendant, the plaintiffs were entitled to treat each shipment separately, and were not compelled to decide on an average of the shipments taken all together.

The account sales furnished by the plaintiffs to the defendant were *prima facie* evidence of the amount realized by the sale of the goods.

Held also (on appeal, reversing the decision of Norman, J.), the words "remittance of £40 to old account" were ambiguous, and did not necessarily import that a further sum was due, so as to constitute an acknowledgment of a debt, which would give a new period of limitation.

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SANAD, RENT-FREE—Jaghir and Service Tenures—Resumption— <i>Power of Zemindar to resume—Government Sale, Effect of, on Jaghirs—Admission in other Suit when Evidence.]</i> In 1775 a rent-free sanad was granted to M. for having put down wild elephants, the consideration in future being to cultivate and keep up a body of men, and take care of the ryots. M. died, and a fresh sanad was in 1786 granted to K. and R., they being thought to be his heirs; but in 1807, M.'s true heirs having established their title, the Government gave them a fresh sanad in lieu of the one to K. and R., reciting the circumstances; both these sanads were to cultivate, keep up a body of men, keep off elephants, and attend to the safety of the ryots. <i>Held</i> that this was not a service tenure that could be resumed, and the subject of service tenures was explained. The zemindari in which these lands were situated was settled in 1802, and was in 1850 sold for arrears of Government revenue; the appellant claimed to set aside the sanad of 1807, on the ground that Government had no right to give such a sanad, but he contended that, if it had, it could be set aside by a purchaser at a Government sale. <i>Held</i>, that the sanad was not a new grant, but a confirmation of the one made before the decennial settlement, and that Government was competent to give such confirmation. An admission by a jaghirdar in a suit brought by Government to assess the lands that the lands were comprised in a zemindari, is evidence of that fact in a suit by the zemindar to resume those lands.	
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SHEBATT OF HINDU IDOL—<i>Right of a Shebait not Transferable.]</i> The right of a shebait of a Hindu idol to perform the services and receive the customary remuneration is not transferable, and cannot be sold in satisfaction of a decree against the shebait.	
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had not been taken in either of the lower Courts.	
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STAMP— <i>Promissory Note.</i>] A. B., by an instrument in writing,	
dated 6th August, promised to pay C. D., "on demand," rupees	
4,310-13-3. In the margin of the instrument was written "due	
30th August," and annexed to A. B.'s signature, was the following	
memo.:—"The sum of rupees 4,310-12-6 only; forty-five days from	
the 5th of August." <i>Held</i> , that the instrument was properly stamped	
as a promissory note payable on demand, and ought to have been	
admitted in evidence.	
<i>Per</i> PRACOCK, C. J.—A promissory note payable on demand	
ought to be stamped as such, notwithstanding there may be a col-	
lateral agreement between the parties that the holder will not pre-	
sent it for a given time, or if paid on demand that the (maker) shall	
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Court was right in setting aside the proceedings of the Moonsiff,	
on the ground that the property in suit was valued at an amount	
beyond his jurisdiction; but the plaintiff was entitled to have the	
plaint returned to him that he might present it with the proper	
additional stamp before the proper Court.	
MUSAMAT LADU <i>v.</i> SHEIKH HIPAZAT HOSSEIN	App. 15
———, WANT OF— <i>Act X of 1862 s. 14—Act VIII of 1859, s. 350</i>	
— <i>Appeal.</i>] An Appellate Court has no power to reverse the judg-	
ment of a Court of first instance merely on the ground that the	
document on which the suit was based did not bear a stamp at all.	
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11 & 12 VICT., c. 21, s. 73— <i>Act VIII of 1859, s. 342—</i> <i>Appeal from Commissioner of Insolvent Court.</i>] Section 342 of Act VIII of 1859 does not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. The right of appeal is given by section 73 of the Indian Insolvent Act, and the Court cannot impose on the appellant a condition that he shall give security for the costs of such an appeal.	
IN THE MATTER OF RAMSERAK MISSE	179
20 & 21 VICT., c. 160... ..	195
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24 & 25 VICT., c. 104, s. 15— <i>Jurisdiction—Power of the</i> <i>High Court—Review.</i>] The lower Appellate Court admitted a petition for review of its judgment after a lapse of ninety days from the date of the decision, without recording that just and reasonable cause for the delay had been shown. On an application, under section 15 of the Charter Act, to the High Court to set aside the order of the lower Court, on the ground that that Court had no jurisdiction to entertain an application for review after a lapse of ninety days, without recording that there was just and reasonable cause for the delay, the High Court refused to interfere.	
ASRAFANNISSA BAGUM v. SYAD INAET HOSSEIN	316
<i>Power of the High Court</i> <i>—Review of Order refusing Petition to sue in Forma Pauperis.</i>] A Court of original jurisdiction has power to entertain an applica- tion to review an order refusing a petition for leave to sue in <i>forma pauperis</i> . Under section 15 of 24 & 25 Vict., c. 104, the High Court set aside an order of a Court of original jurisdiction refusing to enter- tain such an application on the ground that the Court had not jurisdiction to entertain it.	
IN THE MATTER OF THE PETITION OF RANI UMASUNDARI DEBI	App. 29
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29 CAR. II., c. 3, s. 4—21 GEO. III., c. 70, s. 17— <i>Hindu Defendant.</i>] The 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu.	
NEKRAM JEMADAR v. ISWARIPRASAD PACHURI	643
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SUBSISTENCE-MONEY— <i>Discharge—Act VIII of 1859, ss. 276, 278.</i> A prisoner was arrested on August 4th, and committed to prison on the evening of the same day. Before his committal, the execution-creditor paid into the hands of the jailor a sum sufficient for his subsistence-money for 27 days, at the established rate of 4 annas per day. On the 5th August, a writ of <i>habeas corpus</i> was applied for to bring the prisoner up; and on the 6th, a further sum of 4 annas was paid to the jailor to cover any deficiency in the former payment.	
<i>Held</i> , that the requirements of section 276, Act VIII of 1859, had not been fulfilled, and that the prisoner was entitled to his discharge under section 278.	
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On the 30th of September, the plaintiff, a detaining creditor, paid to the jailor of the Calcutta jail subsistence-money for 30 days for a prisoner confined at the suit of the plaintiff, the jailor then having a balance of 4 annas over from the subsistence-money for September. <i>Held</i> , a sufficient compliance with section 276 of Act VIII of 1859.	
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— DECLARATION OF TRUSTS OF A TEMPLE— <i>Act XX of 1863.</i> In bringing a suit under Act XX of 1863, it is not necessary to show that the temple was one which was formerly under control of the Board of Revenue. The Act applies to property in Calcutta.	
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VALUATION OF SUIT— <i>Act XXVI of 1867, Schedule B, Article 11, Note A—Act XVI of 1863, s. 16.</i>] On a dispute arising as to the proper valuation of a suit, the Court may on the application of either party, issue a commission, and make an enquiry into the market value, or the net profits of the property in dispute. The final decision as to the proper valuation is vested in the Court which hears the suit.	
When the defendant asserts that a suit is over-valued, the <i>onus</i> of proving the truth of his assertion lies on him.	
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<i>Appeal.</i>] When a suit has been admitted upon a certain stamp, tried and decreed for the plaintiff, "under valuation" is no ground for dismissing the defendant's appeal.	
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<i>Jurisdiction—Appellate Court.</i>] When it appears, on appeal, that the suit has not been rightly valued, and, if rightly valued, the Court of first instance would not have had jurisdiction to try it, the Appellate Court may entertain the objection, though it had not been raised in the Court below.	
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WILL—*Domicile*—*Rules for Interpretation*—“*Children*”—*Accretions to Property from Kents*.] Where a testator has an ascertained domicile, the construction of his will must depend on the law of that domicile; but if no particular law is applicable, the will is to be interpreted by principles of natural justice.

In such cases, in applying the rules of Hindu, Mahomedan, or English law to the wills of Hindus, Mahomedans, or East Indian Christians, respectively, their particular habits and modes of life may be looked to as a guide to the interpretation.

From the context of the will and surrounding circumstances, “children” may be interpreted as illegitimate children.

Where by will the income of estates was left to devisees for life, with a gift over of the *corpus* on their death, and a portion of the income instead of being divided among the tenants-for-life was applied to the purchase of other estates, *held*, these estates did not pass to the remaindermen, but formed the absolute property of the tenants-for-life, and passed to their devisees.

MUSSAMAT FANNY BARLOW *v.* SOPHIA EVELINE ORDE

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— *Void Bequest—Uncertainty—Superstitious Uses*.] N. E. J., a Hebrew merchant, domiciled in Calcutta, and possessed of both real and personal property, died, leaving a will, by which, after appointing his mother, K. E. J., and his brother, J. E. J., executrix and executor thereof, and making various bequests and provisions, he made the following bequest of the residue of the property:—

“And what may remain after payment of the above-mentioned sums, as well as the debts, shall remain under the control of my brothers, S. E. J. and J. E. J., for the purpose of defraying there- with the expenses for the year, and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their judgment.” *Held*, assuming that the High Court should act in conformity with the English Court of Chancery in carrying out charitable bequests, that as far as the bequest related to giving of alms for the testator’s spiritual benefit, it was void for uncertainty. The “defraying expenses and making charitable distribution” were limited by the bequest to the year within which the testator died.

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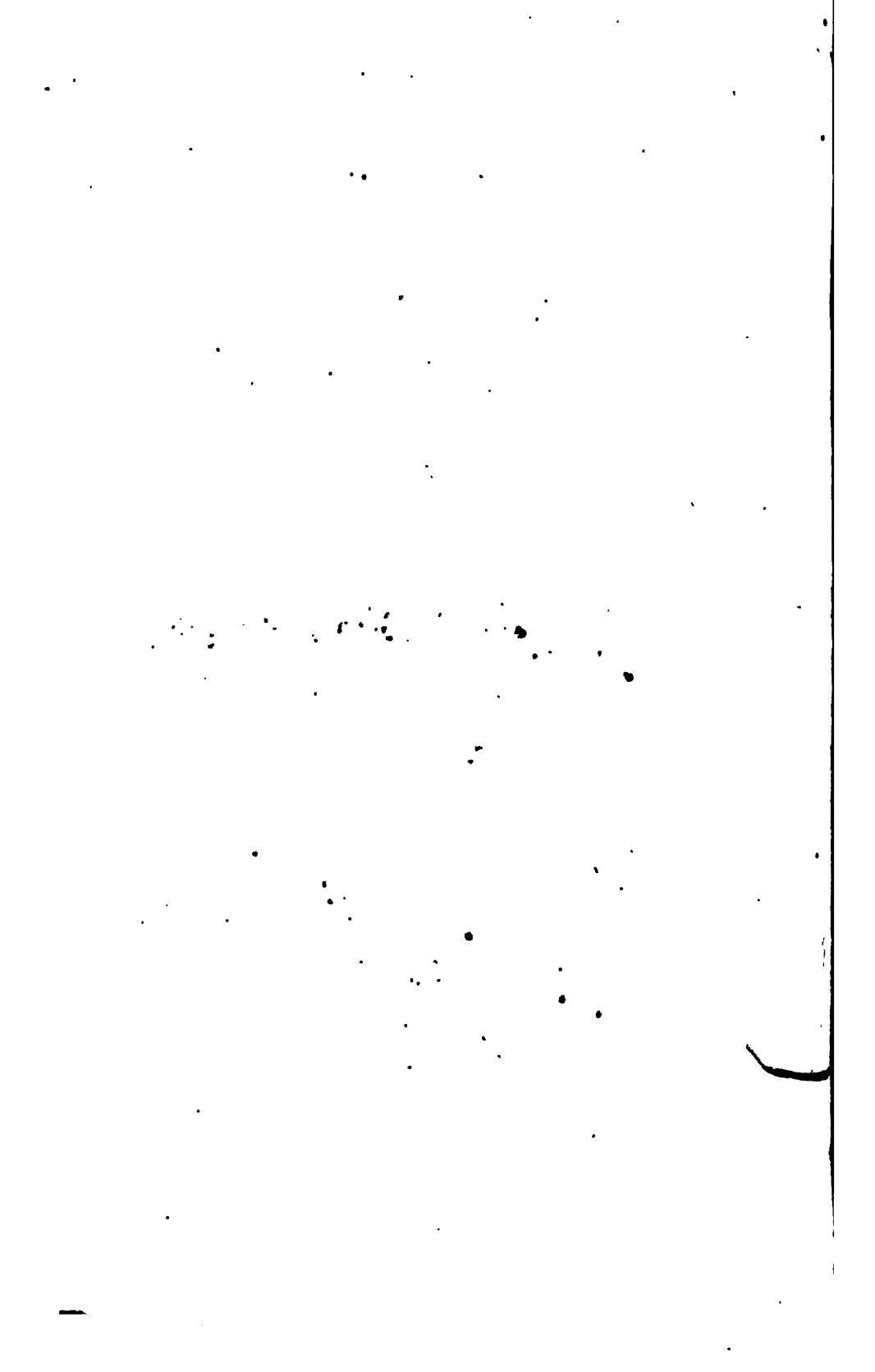
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